(22,922.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 846.

AHA & COUNCIL BLUFFS STREET RAILWAY COMPANY AND OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, APPELLANTS,

vs.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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a United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

UNITED STATES OF AMERICA, *ss:*

Be it remembered that on the 7th day of February, 1910, came the petitioners in the above entitled cause, by their solicitor, and filed in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, their certain bill of Complaint, in the words and figures following, to wit:

Bill of Complaint.

1 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and Omaha & Council Bluffs Railway & Bridge Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States Within and for the District of Nebraska:

1. Humbly complaining, your orators, Omaha & Council Bluffs Street Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, and Omaha & Council Bluffs Railway & Bridge Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, avers the Interstate Commerce Commission, hereinafter made defendant hereto, has been created and established and during all the times hereinafter mentioned, has existed under
2 and by virtue of an act of Congress of the United States entitled "An Act to Regulate Commerce," approved February 4, 1887, and the acts amendatory thereof and supplemental thereto.

2. Your orators further aver that the Omaha & Council Bluffs Railway & Bridge Company is the owner of street railway lines in the city of Council Bluffs in the State of Iowa, and of a street railway line extending on and over a bridge across the Missouri river at a point between the City of Council Bluffs and the City of Omaha, and has its principal offices in the City of Council Bluffs in the State of Iowa, but is not engaged in the operation of its said street

railway lines, but that the same are operated by the Omaha & Council Bluffs Street Railway Company as hereinafter more fully appears.

3. Your orators further aver that Omaha & Council Bluffs Street Railway Company owns and operates all of the street railway lines in the City of Omaha and in the adjacent municipalities of Florence, Benson, Dundee and South Omaha, and all of which are operated as connecting lines and under one system, and has its principal place of business and principal operating offices in the City of Omaha, in the District and State of Nebraska. That your orator, Omaha & Council Bluffs Street Railway Company, also operates, as lessee, all of the street railway lines of Omaha & Council Bluffs Railway & Bridge Company.

4. Your orators further aver that the matter in controversy herein is one arising under the laws of the United States, to-wit: under "An Act to Regulate Commerce," approved February 4, 1887, and the Acts amendatory thereof and supplemental thereto, and that the value of the same in controversy herein exceeds the sum of $2,000, exclusive of interest and costs.

3 5. Your orators further aver that in a proceeding lately pending before the Interstate Commerce Commission in which the West End Improvement Club (a voluntary association of persons) was plaintiff and your orators were defendants, it was charged among other things that the Omaha & Council Bluffs Street Railway Company, as lessee of Omaha & Council Bluffs Railway & Bridge Company, was charging ten cents (10c.) for a single fare between Council Bluffs in the State of Iowa and the City of Omaha in the State of Nebraska, and that said fare so charged was unreasonable and unjust, and praying that your orators be required "to make and fix maximum passenger fares to apply in future to the transportation of passengers from Council Bluffs to Omaha, and the reverse, which shall not exceed five cents (5c.) per passenger, or such charge as the Commission shall find reasonable and just."

6. Your orator, Omaha & Council Bluffs Railway & Bridge Company in its answer to said complaint among other things averred that it was a street railway company and not a commercial railroad and "is not a railroad within the meaning of and is not subject to the provisions of the Acts to Regulate Commerce, approved February 4, 1887, and the Acts amendatory thereof and supplemental thereto, and the rates of fare upon said line of said railroad is not subject to regulation by Interstate Commerce Commission."

Said Omaha & Council Bluffs Railway & Bridge Company in its said answer avers that it was not at the time engaged in the transportation of passengers from Council Bluffs in the State of Iowa to Omaha in the State of Nebraska, but more particularly averred, that its said line of railroad, including the said bridge over the Missouri river between Council Bluffs and Omaha, is being operated by

4 the Omaha & Council Bluffs Street Railway Company, a corporation in the State of Nebraska, under and by virtue of a lease dated December 1, 1902, and that under and by virtue of the terms of said lease, the said Omaha & Council Bluffs Street Railway

Company has the absolute and unlimited control over the said line of said railroad in the complaint described, and receives all fares, rents and revenues derived in the said operation of the said line of electric street railroad, including the said bridge, and the Omaha & Council Bluffs Street Railway Company utilizes its own cars and its own employees in operating the said street railroad. Said answer further averred that the said fare of ten cents (10c.) charged between Council Bluffs, Iowa, and the City of Omaha, Nebraska, was a reasonable fare and denied that the same was unreasonable or unjust.

7. Your orator, Omaha & Council Bluffs Street Railway Company filed its separate answer in said proceeding before the Interstate Commerce Commission, and in said answer among other things averred as follows:

"The defendant company being a street railway company and not a commercial railroad is not a railroad within the meaning of and is not subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof, or supplemental thereto, and the rate of fare upon said line of street railroad is not subject to regulation by the Interstate Commerce Commission."

"This defendant for further answer avers that it is a street railway company organized and existing under and by virtue of the laws of the State of Nebraska, providing for the organization and incorporation of street railway companies and as such street railway company, it is the lessee of the lines of street railroad of the Omaha & Council Bluffs Railway & Bridge Company, and of the bridge across the Missouri river owned by the said last named company."

"This defendant for further answer avers that a fare of ten cents from Council Bluffs in the State of Iowa, to the City of Omaha in the State of Nebraska, is a reasonable and not an exorbitant or extortionate charge."

8. Your orators further aver that at the time of and prior to the making of the lease by Omaha & Council Bluffs Railway & Bridge Company to Omaha & Council Bluffs Street Railway Company, (on or about December 1, 1902), the street railway lines of the bridge company terminated at the west end of the said bridge over the Missouri river and on the east boundary line of the City of Omaha, and that there then and there existed an arrangement between the Council Bluffs Company and the Omaha Company, by which the cars of the Council Bluffs Company passed westward on Douglas street to Fourteenth street, south on Fourteenth street to Howard street, east on Howard street to Eleventh street, north on Eleventh street to Douglas street and thence back on Douglas street to the bridge, thereby forming a loop and by means of which the Council Bluffs cars return to and upon the bridge and thence eastward to Council Bluffs. That after the execution of the said lease from the Council Bluffs Company to the Omaha Company, the same manner of operating the cars of the Council Bluffs Company was continued. That passengers going aboard the cars in Council Bluffs could ride from any point in that city and across the bridge over the Missouri river and into the City of Omaha as far as

traversed by the said cars while going upon or around the said loop within the City of Omaha, and all for the single fare of ten cents (10c.). That when passengers from Council Bluffs desired to go to any other point within the City of Omaha, they trans-
6 ferred from the said cars on the Council Bluffs line to the cars of the Omaha line at such point or points where the several lines intersected or connected, and thereupon paid to the Omaha Company for transportation upon its lines in the City of Omaha, or into the adjacent municipalities of Florence, Benson, Dundee or South Omaha, a single flat fare of five cents (5c.) the same as paid by other persons traveling on the said lines of the Omaha Company.

9. That at the time of the filing of the said complaint before the Interstate Commerce Commission, and at the time of the handing down of the order of Interstate Commerce Commission, hereinafter complained of, and up to and including the present time the same manner of operating the cars continues; that is to say, that the cars coming from Council Bluffs pass over the bridge and around the said loop and return across the bridge and back to Council Bluffs, and that passengers from Council Bluffs who desire to travel upon and over the lines of the Omaha Company, leave the cars of the Council Bluffs Company at some intersecting point and enter upon the cars of the Omaha Company which may carry them to their desired point of destination. To this extent the said two lines are operated independently each from the other, as much so as when the two lines were operated by independent companies. There never has been and is not now a continuous travel or continuous operation of cars of either company upon the lines owned by the other company.

10. On the 27th day of November, 1909, the Interstate Commerce Commission handed down its order in the premises in the matter then pending before it and which said order reads as follows:

7 "No. 1004.

WEST END IMPROVEMENT CLUB
v.
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY and OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY.

This case being at issue upon complaint and answers on file and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of February, 1910, from charging, demanding, collecting, or receiving their present fare of 15 cents per passenger for the transportation of passengers from Council Bluffs, Iowa, not including Courtland Beach, Iowa, to points on defendants' lines in Omaha, Nebr., or from points on defendants' lines in Omaha, Nebr., to Council Bluffs, Iowa, not including Courtland Beach, Iowa.

It is further ordered, That the said defendants be, and they are hereby, notified and required to establish on or before the 1st day of February, 1910, and maintain in force thereafter during a period of not less than two years, a charge for the transportation of passengers from any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, to any point on defendants' lines in Omaha, Nebr., or from any point on defendants' lines in Omaha, Nebr., to any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, which shall not exceed 10 cents per passenger."

8 11. Your orators further aver that the force and effect of the said order is to require of Omaha & Council Bluffs Street Railway Company, as the owner of the electric street railway lines in the City of Omaha and as lessee of the electric street railway lines of Omaha & Council Bluffs Railway & Bridge Company to accept a passenger at any point in Council Bluffs in the State of Iowa, and carry the said passenger therefrom and to and over the said bridge into the City of Omaha for a single fare of ten cents (10c.), and that, if said passenger desires to be carried to any point upon or along the lines of Omaha & Council Bluffs Street Railway Company within the limits of the City of Omaha, to give to said passenger a transfer ticket which shall enable said passenger after he has left the cars on the Council Bluffs line to enter upon and into some car of the Omaha Company, and to be transported upon the cars of the Omaha Company, and upon any of the lines of the Omaha Company within its corporate limits, without paying any additional compensation therefor. Your orators aver that the force and effect of the said order is to require the Omaha & Council Bluffs Street Railway Company to transport passengers upon its street railway lines which are entirely within the State of Nebraska and without compensation therefor, provided it happens that the said traveler may have been transported from the State of Iowa into the State of Nebraska, upon a car operated upon the lines of Omaha & Council Bluffs Railway & Bridge Company.

12. Your orators further aver that the force and effect of the said order in practical operation produces an inequality and discrimination in favor of the traveler from Council Bluffs as against the traveler who becomes a passenger within the limits of the City of Omaha, and to be transported to any point within the limits of the

9 City of Omaha, in this to-wit: that the Omaha passenger who gets aboard an Omaha car to be transported to any point within the limits of the city pays a single flat fare of five cents (5c), while the passenger from Council Bluffs who has paid his ten cents (10c) fare from Council Bluffs, Iowa, to the City of Omaha, is entitled to go aboard the same car as does the Omaha passenger and upon the same Omaha line, and ride to the same point of destination within the limits of the City of Omaha, without paying any fare whatsoever.

That by reason of the premises the said order of Interstate Commerce Commission is null and void and is beyond the power and authority of the Commission to make the same, in that, it produces

a discrimination as to rates and as between passengers, and further in that it is an attempt to regulate rates which are not Interstate rates, but rates for a transportation which are entirely within the State of Nebraska, in that it requires the Omaha & Council Bluffs Street Railway Company to receive upon its electric cars and street railway lines, which are entirely within the State of Nebraska, passengers, and transport them to any point within the City of Omaha in the State of Nebraska, simply because the said passenger may have come from the State of Iowa, and upon a car operated solely upon a line of street railroad owned by Omaha & Council Bluffs Railway & Bridge Company.

13. Your orator, Omaha & Council Bluffs Street Railway Company avers that it is the only company effected by the said order in that it owns and operates all the electric street railway lines in the City of Omaha and in the adjacent municipalities of Florence, Benson, Dundee and South Omaha, and as lessee of the lines owned by Omaha & Council Bluffs Railway & Bridge Company it operates all of the electric street car lines in the City of Council Bluffs and over and across the bridge between the two cities. And your orator, the Omaha & Council Bluffs Street Railway Company further avers that Interstate Commerce Commission has no jurisdiction over it for the further reason that it is incorporated as an electric street railway company under the laws of the State of Nebraska, and exists only as such electric street railway company, and is engaged in the business of a street railway company and under and by virtue of the constitution of the State of Nebraska, and the laws of the State of Nebraska, it is not a railroad within the meaning of that word as used in the constitution and laws of the State of Nebraska, and is not a railroad within the meaning of that word used in the Interstate Commerce Act.

14. The Constitution of the State of Nebraska adopted in 1875 in Article 11 contains provisions relating to the creation and regulation of "railroad corporations." Section 1 of said Article 11 provides that every "railroad corporation" organized or doing business in the State shall have and maintain a public office in the state for the transaction of business "where transfers of stock shall be made" and shall keep books in which shall be recorded the amount of capital stock subscribed; the names of the stockholders; the shares owned by them respectively; that the directors shall make annual reports to the auditor of public accounts "of the amount received from passengers and freight." Sec. 3 of Art. 11 provides:

"No railroad corporation, or telegraph company, shall consolidate its stock, property, franchises, or earnings in whole or in part, with any other railroad corporation or telegraph company owning a parallel or competing line; and in no case shall any consolidation take place, except upon public notice of at least sixty days, to all stockholders, in such manner as may be provided by law."

Section 4 of Art. 11 provides:

"Railways heretofore constructed, or that may hereafter be constructed in this state are hereby declared public highways, and shall

be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited."

Section 8 of Art. 11 provides:

"No railroad corporation, organized under the laws of any other state, or of the United States, and doing business in this state shall be entitled to exercise the right of eminent domain or have power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state."

Each and singular of the sections of said Article 11 of the Constitution of the State of Nebraska apply to commercial railroads engaged in the "transportation of passengers and freight." There is no section of Art. 11 of the Constitution which applies to street railroads.

15. Art. 11*b*. of the Constitution of the State of Nebraska of 1875, under the heading of "Miscellaneous Corporations" provides in Section 2:

"No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any
12 city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof."

It thus appears that under the State Constitution commercial railroads are organized for the transportation of passengers and freight. Street railroads, in the constitution, are treated under the head of "Miscellaneous Corporations" and the section 2, quoted supra contemplates that they shall only operate lines within Cities, Towns or incorporated Villages and then only upon first having obtained the consent of a majority of the electors thereof.

16. Commercial railroads are incorporated in the State of Nebraska under provisions in Chapter 16 (Chapter 16 Compiled Statutes of Nebraska, 1907, p. 531) for the purpose of the transportation of passengers and freight, and authorized to construct and operate railroads between designated termini from point to point within the state. To the contrary, street railroad companies are incorporated under the miscellaneous corporation act and are limited in their powers to the construction and operation of street railroads for the transportation of passengers alone, and upon and along the streets of a city and within the limits of a city and not then until after the consent of the electors of said city first had and obtained.

17. Sections 73 and 75 of Chap. 16, relating to commercial railroads provide as follows:

"SEC. 73. Any number of persons as aforesaid, associating to form a company for the purpose of constructing a railroad, shall, under their hands, make a certificate, which shall specify as follows: First—The name assumed by such company and by which it shall be known. Second—The names of the places of the termini of said road, and the county or counties through which said road shall pass.

Third—The amount of capital stock necessary to construct
13 such road. Such certificate shall be acknowledged before a notary public, and certified by the clerk of the district court in the same manner as is provided for the conveyance of real estate, and shall be forwarded to the secretary of the state, who shall record and carefully preserve the same in his office; and a copy thereof duly certified by said secretary, under the seal of the state, shall be prima facie evidence of the existence of such corporation."

"SEC. 75. Such corporation shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate, and enjoy a railroad with single or double tracks, with such side tracks, turnouts, offices, and depots as shall be necessary, between the places of the termini of the said road, commencing at or within, and extending to or into any town, city, or village, named as the termini of said road, and construct branches from the main line to other towns or places within the limits of this state."

From said section quoted supra it is provided that commercial railroads may be operated throughout the state and are not confined in their operation to cities, towns or villages, and by other sections of the statute said commercial railroads are possessed of the power of eminent domain.

18. Street railways are governed by Chap. 72, Art. 7, (Compiled Statutes of Nebraska, 1907, p. 1196.) Section 1 of Art. 7 provides:

"Any number of persons may be associated and incorporated under the general laws of this state providing for the creation of corporations for the purpose of constructing and operating a street railroad within any of the cities of this state, upon procuring the consent of a majority of the electors of any such city as hereinafter provided."

14 By Sec. 2 of said Art. 7, it is provided that the articles of incorporation are to be recorded in the "office of the county clerk" of the county in which the city within which it is proposed to construct and operate such street railroad is situated and "must procure the consent of a majority of the electors of such city as herein provided."

Sec. 3 of Art. 7 requires that "the articles of incorporation must" * * * "name the streets through which said railway is to be constructed." Sec. 4 of Art. 7 provides for the manner of submitting to the electors of the city the question whether consent shall be given to the construction of the said street railroad in said city and provides that the proposition submitted to the electors shall "name the streets through which said railway is to be constructed." Said Sec. 4 contains the following provisions:

"And provided further, That no franchise to construct street railways shall be hereafter granted, nor shall any election be hereafter held to vote upon any proposition to give the consent of the electors of any such city to the construction of any street railway, unless there shall have been filed, at least ten days before such election, a map or plat showing the route and location of the proposed street railway in the county office wherein are kept the record of deeds of real estate and also whether the proposed railway along such route is to be a single or double track."

Sec. 5 of Art. 7 among other things provides:

"But no street railway shall hereafter be constructed, or consent, or authority therefor be given by any city, or its electors, upon, or along any part of any street in any city upon or along which any street railway has been already constructed, and where any other company or party owns any street railway upon any part of such street it is hereby authorized and empowered to consent to the use of any part of its railway by any other company upon such terms as may be agreed upon by them; Provided, That no such use shall be allowed or enjoyed without its consent; Provided further, That no authority to construct street railway on any street of any city in this state under any franchise hereafter granted, or consent of the electors of any such city thereto hereafter given, shall be operative or effective unless the owners of a majority of the feet front on the real property abutting upon the street or streets upon which it shall be proposed to construct any such street railway shall in writing consent thereto, which written consent shall be filed in the office of the city clerk of the city wherein such street is situated before any election to give the consent of the electors of such city shall be called."

Sec. 12 of Art. 7 defines a street railway as follows:

"The word 'street railway,' as used in the foregoing section, shall be construed to embrace all street railroads built and operated for the convenience of passengers along the streets and alleys and public thoroughfares of cities in this state."

There is no provision in Art. 7 of Chap. 72 which authorizes or empowers a street railway company to carry freight, nor which permits it to exercise the power of eminent domain, or to possess any of the other powers possessed and exercised by commercial railroads, nor to build or construct or operate a line elsewhere than upon the streets of a city after consent of the majority of the electors thereof first had and obtained, and none of the provisions in Art. 7, Chap. 72, apply to commercial railroads. There is no provision either in the Nebraska Constitution, nor in the Nebraska Statutes by which commercial railroads and street railroads may form connections each with the other so as to form a continuous transportation of either passengers or freight, and if your orator would attempt so to do it would be in violation of its charter rights, and such act on its part would be subject to prohibition by the City of Omaha. Commercial railroads and street railroads as corporations in their practical operation have at all times in the State of Nebraska been maintained as separate and distinct corporations each from the other, and each having distinct corporate powers.

19. Your orator, Omaha & Council Bluffs Street Railway Company, was incorporated as a street railway company under the general incorporation laws of the State of Nebraska, hereinbefore referred to and is the owner of and engaged in the operation of street railway lines on the streets of the City of Omaha, and upon the streets of the adjacent municipalities of Florence, Benson, Dundee and South Omaha, under rights granted by the electors of said cities as provided for under Sec. 2 of Art. 11*b*. of the Constitution of the

State of Nebraska and under the provisions of Art. 7 of Chap. 72 of the Laws of the State of Nebraska hereinbefore more particularly referred to.

20. Omaha & Council Bluffs Railway & Bridge Company of Iowa was incorporated under the general incorporation laws of the State of Iowa as a street railway company and as such corporation constructed its lines of railway in the City of Council Bluffs, Iowa, as a street railway company under a franchise granted to it by the City of Council Bluffs, and that said company continued to operate its lines as such street railway company until on or about Dec. 1, 1902, when it leased its said street railway lines to your orator, Omaha & Council Bluffs Street Railway Company, as hereinbefore more particularly stated.

17 21. Under the laws of the State of Iowa, a street railway is distinct from a commercial railroad and the terms "railway," "railways" and "railway corporations" as used in the statutes of Iowa do not refer to, or include street railway companies. Such has become, and is the settled law of the State of Iowa, as was adjudicated in the case of Fidelity Loan & Trust Co. v. Harry E. Douglas, 104 Ia., 532, where the court defined the distinction between the two kinds of corporations as follows, p. 536:

"We are of the opinion, however, that the terms 'railway' and 'railways' were used in the chapter of the Code of 1873 referred to, are always intended to designate one or more of the commercial railways,—that is railways designed for the transportation of passengers and freight from place to place within the state, or from state to state, or both, and upon which, as a rule, the transportation is effected by means of trains of cars moved by locomotive engines,—and not railways which are designed chiefly for the carriage of passengers from point to point in a single city or town. And we are of the opinion that the term, 'railway corporations,' as used in that chapter, refers only to corporations which own or operate such commercial railways."

22. Your orators upon information and belief aver that they are not railroads or common carriers within the meaning of the "Act to Regulate Commerce;" that said act by its terms applies to "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control;" that said act defines railroads as follows: "The term railroad as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any

18 corporation operating a railroad, whether owned or operated under a contract, agreement or lease;" that wherever the phrase "common carriers" is used in the said Act it is coupled with the limiting phrase "subject to the provisions of this Act."

From the various provisions in the said Act to Regulate Commerce it appears that the said Act refers to commercial railroads as distinct and separate from street railway companies, and that the term "railroad" as used in the said Act applies to railroad companies that are engaged in transportation of passengers or freight through-

out the various states of the Union, and so constructed, conducted and operated that there may be a transfer of either cars or property from the line or lines of one company to the line or lines of a connecting company which is impracticable and impossible as between your orators as street railway companies and the commercial railroads in the said states of Iowa and Nebraska. And by reason of the premises, and as advised by counsel, your orators aver that when the said Act to Regulate Commerce was passed by Congress, and at the time of the enactment of the amendments thereto, it was understood that the said Act to Regulate Commerce was not intended to apply, and did not apply to street railway companies such as your orators. That by reason of the premises aforesaid, your orators aver upon advise of counsel, that the Interstate Commerce Commission did not have jurisdiction over your orators or either of them to make the said order herein complained of, and that the said order is null and void.

23. Your orators further aver that if the said order of the Interstate Commerce Commission is allowed to become and remain effective it will produce a large reduction in the revenue of your orators, and particularly to your orator, Omaha & Council Bluffs Street Railway Company, in that it will be compelled to transport passengers over its street railway lines in the City of Omaha without any compensation whatsoever, provided said passengers shall first have come over the street railway lines from Council Bluffs, in the State of Iowa, and that such reduction of revenues to your orator will exceed the sum of $20,000.00 per year.

Your orators further aver that if the Omaha & Council Bluffs Street Railway Company should refuse to obey the said order of the Interstate Commerce Commission and should refuse to grant transfers to, or to transport in its cars over its street railway lines in the City of Omaha, and without compensation, passengers arriving on the street railway lines from Council Bluffs, that many suits would be brought against each of your orators by many persons claiming to be entitled under the order of the Interstate Commerce Commission, to be so transported over the street railway lines in the City of Omaha, whereby your orators, and each of them, would be subjected to a multiplicity of suits and great loss and damage will be inflicted upon your orators and each of them, all of which acts and doings will greatly injure and embarrass your orators, and each of them, in the transaction of their business.

Your orators further allege that, notwithstanding the facts aforesaid, the said Interstate Commerce Commission maintains and intends to maintain and will, unless the same is enjoined or suspended by the order of this Honorable Court, maintain the said order as an effective order; and institute or suffer to be instituted the judicial proceedings aforesaid, which acts and doings are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators.

24. In tender consideration whereof, and for as much as your orators are remediless in the premises at and by the strict rules of the common law and are only relievable in a court of equity where

matters of this nature are properly cognizable and relievable. Your orators, therefore, pray that upon the filing of this bill a temporary or interlocutory order be entered herein, suspending the said order of the said Interstate Commerce Commission and restraining the enforcement of the said order of the said Commission and restraining the said Commission from taking any steps or instituting any proceedings to enforce the said order, and that upon a final hearing of this cause a decree be entered herein, setting aside and annulling the said order of the said Interstate Commerce Commission and perpetually enjoining the said defendant and its members, their agents, servants and representatives from enforcing said order and from taking any steps or instituting any proceedings for the enforcement of the said order.

Your orators further pray that if any delay intervenes between the filing of this bill and the issuance of a temporary or interlocutory order as prayed for herein, an order be issued herein suspending the said order of the said Interstate Commerce Commission and enjoining the enforcement thereof until the hearing and final determination of the application for the temporary or interlocutory order prayed for herein.

And your orators further pray that such other and further relief be granted in the premises as justice and equity may require and as to your Honors may seem meet.

And your orators further pray that your Honors grant
21 unto your orators a writ of subpœna of the United States of America directed to the said Interstate Commerce Commission commanding it at a certain day and under a certain penalty therein to be specified personally to be and appear before your Honors in this Honorable Court and then and there full, true and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived), and to stand to and abide by such order and decree herein as to your Honors shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray, etc.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY AND
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY,
By JOHN LEE WEBSTER,
Solicitor for Complainants.

STATE OF NEBRASKA,
County of Douglas, ss:

Frank T. Hamilton, being first duly sworn, deposes on oath and says that he is the Vice-President of Omaha & Council Bluffs Street Railway Company, one of the complainants herein; that he has read the said bill of complaint and knows the contents thereof, and that the facts therein stated are true, and that the allegations of conclusions and matters stated upon information and advice of counsel are true as this affiant verily believes.

FRANK T. HAMILTON,
Vice-President.

Subscribed in my presence and sworn to before me this, the 5th day of February, 1910.

[NOTARIAL SEAL.] MARIE R. RACKLEY,
Notary Public.

22 And afterwards, to wit, on the 14th day of February, 1910, there was filed in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain certificate of the Attorney General of the United States, in the words and figures following, to wit:

Certificate of the Attorney General.

23 In the Circuit Court of the United States for the District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY
v.
INTERSTATE COMMERCE COMMISSION.

To the clerk or said court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway and Bridge Company against the Interstate Commerce Commission, under the act of Congress entitled "An Act to regulate commerce," approved February 4, 1887, as amended, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the Act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of February 4, 1887, entitled 'An Act to regulate commerce' " approved February 11, 1903, you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the Circuit Judges of the Eighth Circuit, to the end that said case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three of the Circuit Judges of said circuit as is provided by the said Act of February 11, 1903.

GEO. W. WICKERSHAM,
Attorney General.

Washington, D. C., February 8, 1910.

24 And afterwards, to wit, on the 26th day of February, 1910, came the petitioners in the above entitled cause, by their solicitor, and filed in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, a certain notice, in the words and figures following, to wit:

Notice of Hearing for Temporary Injunction.

25 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Notice of Hearing for Temporary Injunction.

To Interstate Commerce Commission:

You are hereby notified that the complainants in the above entitled cause will apply to the Judges of the United States Circuit Court at Federal Court House, St. Louis, Missouri, on the 12th day of February, 1910, at the hour of ten o'clock A. M., or as soon thereafter as the parties can be heard for the granting of a temporary order of injunction to enjoin the enforcement of an order made by the Interstate Commerce Commission on the 27th day of November, 1909, in a matter then pending before the Interstate Commerce Commission, in which West End Improvement Club was plaintiff and Omaha & Council Bluffs Railway and Bridge Company and Omaha & Council Bluffs Street Railway Company were defendants. A copy of the petition for said injunction is handed you herewith.

Dated this the 7th day of February, 1910.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY AND
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY,
By JOHN LEE WEBSTER,
Solicitor for Complainants.

Service foregoing accepted February 7, 1910.
EDW. A. MOSELEY
Sec'y Interstate Com. Commission.

26 And on the same day, to wit, the 26th day of February, 1910, there was filed and entered in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain order, in the words and figures following, to wit:

Order Setting Cause for Hearing.

27 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

An Order.

This matter coming on to be heard on the application of the complainants for a temporary injunction, and it appearing that due notice with the copy of the complaint was served upon the Interstate Commerce Commission on the 7th day of February, 1910, fixing the time for hearing February 12, 1910, at the Federal Court rooms in the city of St. Louis, and:

Whereas, the Attorney General of the United States has filed a certificate as provided for in Section 16 of the Act to Regulate Commerce, and:

Whereas, the attendance of three (3) Circuit Judges to hear the application for an injunction can not be had until the 1st day of March, 1910.

It is therefore ordered that this matter be continued and set for hearing on the 1st day of March, 1910, in the Federal Court rooms in the city of St. Louis.

WALTER H. SANBORN,
Circuit Judge.

February 12, 1910.

28 And afterwards, to wit, on the 3d day of March, 1910, there was filed and entered in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain appearance, in the words and figures following, to wit:

Appearance of P. J. Farrell.

29 In the Circuit Court of the United States for the District of Nebraska.

THE OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

v.

INTERSTATE COMMERCE COMMISSION, Defendant.

To the Clerk of said Court:

Please enter my appearance as solicitor for the Interstate Commerce Commission, the defendant in the above entitled cause.

P. J. FARRELL,
Solicitor for the Interstate Commerce Commission, Defendant.

30 In the Circuit Court of the United States Within and for the District of Nebraska, Omaha Division.

"Thursday Morning.

OMAHA, NEBRASKA, *March Third*, 1910.

No. 241, "Y."

THE OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Appearance.

Now on this 3d day of March, 1910, comes P. J. Farrell, and enters his appearance as solicitor for the Interstate Commerce Commission, the defendant in the above entitled cause.

P. J. FARRELL,
Solicitor for the Interstate Commerce Commission, Defendant."

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of said Court hereby certify the above and foregoing to be a true and correct copy of the entry of appearance in the order book as the same appears of record in my office.

Witness my hand and the seal of said court at Omaha, this 14th day of February, A. D. 1911.

[Seal of the United States Circuit Court.]

GEO. H. THUMMEL, *Clerk.*

31 And on the same day, to wit, the 3d day of March, 1910, came the respondent Interstate Commerce Commission, by its solicitor, and filed in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, its certain demurrer and answer to the bill of complaint, in the words and figures following, to wit:

Demurrer and Answer of Interstate Commerce Commission.

32 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and Omaha & Council Bluffs Railway & Bridge Company, Complainants,

v.

INTERSTATE COMMERCE COMMISSION, Defendant.

Demurrer and Answer of the Interstate Commerce Commission Above-named Defendant, to the Bill of Complaint of the Above-named Complainants.

I.

Demurrer.

The Interstate Commerce Commission, the defendant in the above-entitled suit, by protestation, not confessing or acknowledging any of the matters or things in paragraphs 1 to 9, inclusive, and paragraphs 11 to 24, inclusive, or in any of said paragraphs, in the bill of complaint of the above-named complainants contained to be true in such manner and form as the same are therein set forth and alleged, demurs to said paragraphs of said bill and the allegations contained in said paragraphs. And for cause of demurrer shows—

33 I.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown any equity existing in said complainants.

II.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that said complainants are entitled to the relief or any of the relief asked for by them in and by said bill.

III.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that the legislative department of the United States Government is or ever has been without power to grant the authority exercised by this defendant in making the order set forth in said complainants' said bill.

IV.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said para-

graphs or any of such allegations, shown that said legislative department did not duly confer upon this defendant the authority exercised by this defendant in making said order.

34 V.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that the subject-matter of said order is not within the jurisdiction conferred upon this defendant by said legislative department.

VI.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that in making said order this defendant exercised authority in excess of the authority conferred upon it by said legislative department.

VII.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that in making said order this defendant exercised unlawfully the authority or any of the authority conferred upon it by said legislative department.

VIII.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that in making said order this defendant violated any constitutional or other right of
35 said complainants, over which this court has or may exercise jurisdiction.

Wherefore and for divers other good causes of demurrer appearing in and by said paragraphs, this defendant demurs thereto and prays the judgment of this honorable court whether defendant shall be compelled to make any answer to the said paragraphs or any of them or to the allegations contained in said paragraphs or any of such allegations.

(2.)

Answer.

And this defendant, the Interstate Commerce Commission, not waiving the said several demurrers, but wholly relying and insisting thereon, for answer to paragraph 10 of said bill says:

This defendant admits that on November 27, 1909, this defendant made and entered an order as stated by said complainants in paragraph 10 of their said bill, and admits that said order was in words and figures substantially as set forth by said complainants in said

paragraph 10. In this connection this defendant alleges that on said November 27, this defendant made and filed a report containing its findings of fact and conclusions thereon; that said order was based upon said report, including said findings of fact and said conclusions, and that said report was and is referred to in said order and made a part thereof by this defendant. A copy of said report, marked "Exhibit A," is hereto attached and hereby made a part of this answer.

36 This defendant denies that said complainants are entitled to the relief or any of the relief prayed for by them in their said bill, and this defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

INTERSTATE COMMERCE COMMISSION,
By EDWARD A. MOSELEY,
Secretary Thereof, Thereunto Duly Authorized.
FRANCIS S. HOWELL, *United States Attorney;*
P. J. FARRELL,
Special Assistant United States Attorney,
Solicitors for Defendant.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

P. J. FARRELL,
Solicitor for Defendant.

WASHINGTON,
District of Columbia, ss:

Edward A. Moseley, being first duly sworn, says on oath that he is the secretary of the defendant; that he knows the contents of the foregoing demurrer and answer; that the said demurrer is not interposed for delay; and that the matters and things stated in the answer are true to the best of his knowledge and belief.

EDWARD A. MOSELEY.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this 10th day of February, 1910.

[NOTARIAL SEAL.]

H. S. MILSTEAD,
Notary Public.

37 EXHIBIT A.

No. 1004.

WEST END IMPROVEMENT CLUB
v.
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY et al.

Submitted June 5, 1908; Decided November 27, 1909.

Complaint alleges that the 10-cent fare from Council Bluffs to Omaha is unreasonable and that it is unjustly discriminatory, because defendants give longer rides for 5 cents on lines which do not cross the bridge. Defendants allege that they are street railways and not amenable to the terms of the act to regulate commerce, and that to reduce the fares as prayed for would result in a net loss from the operation of the properties; *Held*, That defendants are common carriers, engaged in the Interstate transportation of persons, and, therefore amenable to the terms and jurisdiction of the act; that the record does not disclose justification for making the reduction prayed for, but that it is unreasonable to charge more than 10 cents for a trip between any point on defendant's lines in Council Bluffs and any point on defendant's lines in Omaha.

Walter I. Smith, G. H. Scott, and T. W. Blackburn for complainant.

John Lee Webster and Emmet Tinley for defendants.

Report of the Commission.

CLARK, *Commissioner:*

Complainant is a voluntary improvement association, the membership of which consists of business men of Council Bluffs, Iowa.

The complaint assails as unjust, unreasonable, discriminatory, and preferential the fare of 10 cents per passenger in either direction between the cities of Omaha, Nebr., and Council Bluffs, Iowa, over defendant's bridge crossing the Missouri River, and prays "that no extra charge be made when in the course of interstate transportation passengers are carried over such bridge," and the establishment of a uniform fare of 5 cents per passenger.

The Omaha & Council Bluffs Railway & Bridge Company, hereinafter referred to as the Bridge Company, under authority of
38 an act of Congress (chap. 356, 49th Cong., vol. 24) constructed and owns a railroad, wagon, and foot toll bridge over the Missouri River at Omaha, Nebr., and Council Bluffs, Iowa, and also a railway, which begins at the west end of the bridge, in Omaha, Nebr., and extends eastward to Council Bluffs, Iowa. The Bridge Company also owns the stocks and bonds of the Omaha, Council Bluffs & Suburban Railway Company, a street-railway line

in Council Bluffs. The Omaha & Council Bluffs Street Railway Company, hereinafter referred to as the Street Railway Company, owns and operates all of the street-railway lines in Omaha, Nebr. In January, 1903, the Street Railway Company leased all of the properties of the Bridge Company for a period of years and now operates all the lines of both systems.

The toll for foot passengers crossing the bridge is 5 cents; therefore adding the street railway fare of 5 cents to the bridge toll makes the charge for transportation when a passenger crosses the bridge on the railway.

The single fare is 10 cents; but nontransferable, limited commutation tickets, each entitling the holder to 30 rides, are sold to all persons desiring them for $1.50.

The defendants contend that:

(1) Complainant is not a proper party to maintain this action.

(2) The defendants, being street railway companies and not commercial railroads, are not railroads within the meaning of, and therefore not subject to the provisions of, the act to regulate commerce.

(3) The fare of 10 cents is violative of no provision of the act to regulate commerce.

(1) The decisions of the Commission and the law itself which provides that "no complaint shall be dismissed because of absence of direct damage to complainant" stand for the principle that complainant is entitled to standing as such under the act.

(2) The first section of the act provides that its terms shall apply "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad," and that "the term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad," etc. Counsel for defendant admits that the Bridge Company and Street Railway Company are common carriers engaged in interstate transportation. The contention in this connection is that they are not railroads within the meaning of the law. In brief and argument defendants cite decisions of the courts in which it has been held that street railways are not railroads and that statutes relating to railroads do not include nor apply to street railways unless street railways are specifically mentioned.

39 The decisions which have been cited by defendants, generally speaking, refer to questions of whether or not, where there is a general railroad law and a specific act of the legislature distinctly naming street railways, the general law refers to street railroads; whether a fellow-servant law was applicable to street railways; whether a board of railroad commissioners has jurisdiction over street railroads; whether a statute giving laborers a lien upon railroads also applied to street railways; whether a street railway was a railroad within the meaning of the laws of Indiana regulating crossings.

Unquestionbly many or all of those decisions are eminently sound under the facts then considered. Masillon Bridge Co. v. Cambria

Iron Co., 59 Ohio St., 179, holds that the word "railroad" as used in the statute relating to railroads does not include street railroads, the statutes of the state relating to railroads and to street railroads being separate and distinct. A decision upon such a state of facts can not be controlling here. If there were a federal law specifically applying to street railroads none would contend that the present act to regulate commerce governed street railways. But here the act, recently amended, in plain terms applies to any common carrier engaged in the transportation of persons by railroad from one state to another.

In Fidelity Loan & Trust Co. v. Douglas, 104 Iowa, 532, in which it was held that as used in the laws of that state the word "railroad" does not include "street railroads," the court expressly stated that the interpretation there adopted applies to section 1309 of the code and not to section 2075, which applies "in terms to street-railway corporations." Judge Waterman, dissenting, said in reference to section 1309:

Being remedial in its character, the section should receive a broad and liberal construction. In interpreting such statutes, it is said: "The old law, the mischief, and the remedy must be kept in mind. That which is within the mischief intended to be remedied is considered within the statute, though not within the letter; and that which is not within the mischief is not within the statute, though within the letter." (Citing authorities.) Here the railway mortgage is clearly within the mischief, and just as clearly within the letter of this remedial section. To restrict the statute to a particular class of "mischief makers," rather than apply it to the "mischief," by whomsoever done, is to adopt a narrow and illiberal rule of construction.

In Ohio, by statute, an interurban electric railroad is classed as a street railroad, but in Cincinnati, Lawrenceburg & Aurora Electric Street Railroad Company v. Lohe, 68 Ohio Stat., 101, on an action brought to recover damages for the alleged negligent killing of plaintiff's interstate, it was held:

It seems reasonably clear that while operating the cars of an interurban railroad within a municipality the regulations and powers of a street railroad company are applicable; but when it comes to running cars of such railroads in the open country, upon a track substantially the same as the track of a steam railroad, and at a high rate of speed, it would seem that the same rules as to negligence and contributory negligence should prevail as are applicable to steam railroads.

It has been held that statutes giving certain powers to railroads include street railroads operated by horsepower; that a statute authorizing the consolidation of railroads is applicable to street railroads; that statutes making the proprietors of any "railroad" liable for injuries caused by the negligence of its servants, prohibiting the obstruction of "railroad tracks," and taxing the property of "any railroad company" include street railways; that street railways are within a statute requiring some person on the locomotive to keep a lookout and requiring a whistle to be sounded to prevent accidents,

etc. Many decisions both pro and contra may be cited, but the state of the law is set forth in Elliot on Railroads, section 6:

It is not easy to reconcile all of the decisions and about all that can be said is that the question as to whether a street railway is included in the term "railroad" in any particular case is determined largely by the context or connection in which the term is used.

In Massachusetts Loan & Trust Co. et al. v. Hamilton, 88 Fed. Rep., 588, it is said:

The meaning of the word must always depend upon the context and the legislative intent of the statute in which it is used, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view.

In Malott v. C. & E. St. L. Electric R. Co., 108 Fed. Rep., 313, Judge Grosscup said:

There is nothing in the acts of 1872 and 1889 that restricts railroads therein mentioned to the use of steam as a motive power, or prevents existing steam roads from changing their motive power to that of electricity. There is nothing in these acts that necessarily or fairly excludes its application to electrical roads, as they now exist; indeed these electrical roads, in the speed of their trains, in the distance traveled, and in the capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam roads alone. We can not conceive that these facts, so far, at least, as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purposes of general transportation.

This Commission in Willson v. Rock Creek Ry. Co., 7 I. C. C. Rep., 83, held that a street railway company engaged in transporting suburban passengers between points in the District of Columbia and points in an adjoining state is subject to the provisions of the act, it was there said:

We can not sustain defendant's contention that the act to regulate commerce applies only to the ordinary steam railways by which interstate traffic is mainly carried, and that street surface
41 roads for urban and suburban passenger travel are exempt from its provisions. It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads and their dealings with the public. But the terms of the statute in this regard are broad and general, and it contains no exception indicating a design to exclude from its operation those interstate roads which are constructed upon public highways, to provide the means for local passenger transportation in the streets of towns and cities and their various suburbs. We see no reason to doubt that the authority of this enactment may be invoked for the regulation of carriers like the defendant, if their business is actually interstate, whenever occasion arises for subjecting them to its restraints and requirements.

Since that decision was rendered numerous and important amendments to the act have been enacted. None of those amendments con-

tain any suggestion that is in conflict with the interpretation that had been placed upon the jurisdiction of the act. On the contrary, amendments to section 1 of the act, which will presently be noticed, strengthen and reinforce the view adopted by the Commission. That view must therefore be considered a part of the present act.

In C. & M. Elec. R. R. Co. v. I. C. R. R. Co., 13 I. C. C. Rep., 27, it was stated that—

The act makes no distinction between railroads that are operated by electricity and those that use steam, nor has the Commission thought at any time to make such distinction Both are subject to the act when engaged in interstate transportation and are entitled to equal consideration in any controversy before us. Moreover, progress in the science of electricity and the rapid increase of new devices for its application have led many practical railroad men to think that we may be measurably near its general use as the chief motive power in transportation.

In the instant case it should be remembered that the defendants have the characteristics of an interurban line as well as of a street railway. They operate 136 single-track miles of road; the rails are not all laid in public streets and highways, but for some distance run over private right of way; they operate over the bridge across the Missouri River, and through sparsely settled sections over expensive culverts not conforming to the level of the streets or roads; they carry the United States mail and do not serve the needs of a single city and its suburbs, but of two cities and several towns, villages, and resorts. As was said in Birmingham R. Co. v. Jacobs, 92 Ala., 187, 12 L. R. A., 830:

A railroad * * * running beyond the corporate limits of any city or town and through counties is not and necessarily can not be a street railway, within the meaning of the constitution and the provisions of the code in regard to street railways; and after leaving the city limits, as we have shown, they are no longer street railways subject to municipal regulations, and if not railroads within the meaning of the general law, we may well inquire what kind of railroads are they and by what laws are they governed? Can it be pre-
42 sumed that the legislature intended to provide for the incorporation of a species of railroad companies sui generis, not subject to any law except the common law for common carriers, while the duties and liabilities of all other railroad companies are regulated and controlled by statutory enactments?

So we must determine from the context, scope, and intent of the act to regulate commerce whether or not its provisions are properly applicable to defendant's railways.

In the debates in the Congress the paramount questions discussed were abuses in connection with freight transportation; unjust discrimination, unreasonable rates, etc. But this fact does not furnish an argument for excluding from the provisions of the law common carriers engaged solely in the interstate transportation of passengers. It was stated in the debates that the law was not intended to apply to "street railways." We must, however, assume that the street railways of that day, and not the interurban lines of this day, were in mind when that statement was made. Some of the largest

railroads bear the corporate title "Railway Company." Other roads of identical character and kind use the title "Railroad" or "Railroad Company." The words "railway" and "railroad" are completely synonymous of each other and no significance can be attached to the choice of either name or to the use of either word in a statute, decision, or discussion. The words of the act "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad" indicate that a common carrier engaged in the interstate transportation of either and not necessarily of both is subject thereto. The relative importance of freight and passenger transportation necessarily increased the attention given to the former and minimized the discussion of the latter.

The term "railroad" as defined in the act of 1887 is enlarged by the provisions of the act of 1906 by the addition of the words "and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property." Note the distinction and the comprehensive language: Those "used or necessary" "in the transportation of persons or property" and "in the transportation or delivery of any of said property." A switch, spur, track, or terminal facility used or necessary exclusively in the transportation of persons is as much subject to the act as are "freight depots, yards and grounds," used or necessary "in the transportation or delivery of any of said property."

With general uniformity throughout the act the use of the words "passengers or property" clearly denotes that carriers of either the one or the other or both are subject to its provisions. Certainly the words of the statute are broad and comprehensive enough to
43 include interstate interurban railroads, and there is nothing in the law which indicates an intent to exclude them. No one questions the jurisdiction of the act over interurban lines which enter the streets of the city of Washington and transport persons to and from adjoining states. The street railways which do not extend beyond the limits of the District of Columbia are governed by other laws. Interurban lines are becoming more and more an important factor in the transportation of freight as well as of passengers. It can not be said that the act controls as to the transportation of property but does not apply to the transportation of persons. If interurban lines were to be exempted from the requirements of the act on the ground that they are street railways it would be impossible to so administer the law as to correct the evils and the mischief at which it was aimed.

Defendants' contention that to hold that the terms "common carrier" and "railroad" include street railroads would "lead to many conflicting embarrassments in the construction and application of the act" does not appeal strongly to us. In every broad and general law there are provisions which necessarily and reasonably are not applicable in particular instances. In Malott v. C. & E. St. L. Electric R. Co., supra, it was held that the acts applied "so far, at least, as they are reasonably applicable." Pipe lines are specifically made

common carriers, subject to the provisions of the act to regulate commerce, and yet no one would consider it other than absurd to prohibit a pipe line from giving an interstate free pass for a passenger, or to require it to furnish cars, to publish refrigeration or icing charges, to construct and maintain a switch connection, or to do many of the things which are required of railroads. Similar observations could be made as to express companies, sleeping-car companies, and boat lines engaged under a common control, management, or arrangement with a railroad in the interstate transportation of persons or property. Whether or not a particular provision of the law applies to a particular common carrier subject to the law must be determined from the facts.

Even admitting that in its popular acceptation the word "railroad" usually applies to standard commercial railroads, we think it plainly evident that it was the intent of the Congress to include within the provisions of the act any and all common carriers engaged in interstate carriage by railroad. No provision of the law is repugnant to that thought, and there are no qualifying words which suggest a different conclusion. The great body of strictly street railways are engaged in serving purely local needs, lie wholly within the confines of a single state, and, by the express terms of the statute, are not within our jurisdiction because not engaged in interstate transportation. It would be a narrow, strained, and illiberal construc-
44 tion to hold that designating an interurban railroad a "street railway" was sufficient to excuse such railroad, when engaged in interstate transportation, from the operation of the law. So far as the practices of common carriers of passengers are concerned, interurban railroads might as certainly, to the same extent and in the same manner as any other carrier or railroad, cause the abuses denounced by the law; they might discriminate as unjustly and charge as unreasonable fares as the railroads denominated as commercial. It follows that they are within the "mischief felt and the object and remedy in view." If interstate, they are clearly outside the jurisdiction of the individual state, and where they are "common carriers engaged in the transportation of passengers or property," as specified in the act, we entertain no doubt of their amenability to its provisions.

Defendants argue that for Council Bluffs, a municipality of the state of Iowa, to fix by ordinance or franchise the maximum rate of fare to be charged for a continuous trip from that city to points in the state of Nebraska would be a regulation of interstate commerce and that such an ordinance could have no extraterritorial effect. Granted; but if the contention is correct that defendants are not subject to the act to regulate commerce, the reasonableness of the fares could be determined only by the common law or by Congress. It is not conceivable that Congress intended to leave the great number of interurban railway companies engaged in the interstate transportation of passengers to regulation by the inadequate remedies of the common law.

In this particular case, the charter granted March 3, 1887, to the Bridge Company provides "and Congress reserves the right, at any time, to regulate, by appropriate legislation, the charges for freight

and passengers over said bridge." Section 26 of the amended act provides "that all laws and parts of laws in conflict with the provisions of this act are hereby repealed." The question naturally arises whether this section operates as a repeal of the charter provision.

The general rule of construction is that a general statute will not repeal the provisions of a former one which is special or particular unless there is something in the general law or in the course of legislation upon its subject-matter that makes it manifest that the legislature contemplated and intended a repeal. The law does not favor a repeal by implication, and where it is possible to so construe the statutes as to maintain the integrity of both it must be done. In other words, it is only where there is irreconcilable conflict or repugnancy that the special or particular statute falls under the repealing clause of the general statute. In the Nebraska Freight Rate case, 64 Fed. Rep., 165, and 169 U. S., 466, the circuit court of the
45 United States for the district of Nebraska and the United States Supreme Court held that the state could, until Congress should prescribe the rates to be charged, regulate intrastate rates of a road which had received a charter from the United States in which there was contained a reservation to the United States for fixing rates. See also the Reagan case, 154 U. S., 413.

In Daviess v. Fairbairn, 3 How., 636, the Supreme Court said that if a subsequent statute be not repugnant in all of its provisions to a prior one, yet if the latter statute clearly intends to prescribe the only rule which shall govern it repeals the prior one. The principle that where the regulation of commerce requires a uniform rule the power of Congress is exclusive, but where it requires different rules in different localities the state may legislate, but only in the absence of congressional legislation, is well established. It seems undoubted that the act to regulate commerce was clearly intended by the Congress to prescribe the only rule as to the regulation of interstate rates and that it should and does supersede different rules in prior statutes.

In Texas & Pacific Ry. v. Abilene Cotton Oil Company, 204 U. S., 426, the court said:

Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and that duty, which the statute casts upon that body, of seeing to it that the statutory requirements as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discriminations, and afford, moreover, a ready means by which, through collusive proceedings, wrongs which the statute was intended to remedy could be successfully inflicted.

Here there is no difficulty about so construing the statutes as to preserve the integrity of both. Congress reserves the right to regulate the charges of the Bridge Company by appropriate legislation. Instead of specifically fixing those charges by statute the Congress "by appropriate legislation" delegated that function and authority to the Commission. So that whether or not it be held that techni-

cally the act to regulate commerce repealed the reservation in the act which granted the charter of the Bridge Company, the present jurisdiction of the Commission over the interstate transportation charges of the defendants is clear.

We now come to a consideration of the reasonableness of the fare. The petition attacks the reasonableness of the fare from Omaha to Council Bluffs or from Council Bluffs to Omaha. The local fare in Omaha and in Council Bluffs is 5 cents. From the west end of the bridge the line in Omaha passes westward on Douglas to Fourteenth street, south upon that street to Howard, east to Eleventh,
46 north to Douglas, and eastward back to the bridge. The fare from Council Bluffs to any point on this loop is 10 cents, and the fare from any point on the loop to any other point in Omaha is 5 cents. The fare from any point on the loop, across the bridge and to any point in Council Bluffs (with the exception of Courtland Beach, which, on account of the Missouri River changing its course, is on the west side of the river, but within Council Bluffs), is 10 cents. The reasonableness of the 10-cent fare and the reasonableness of confining it to points on the loop are put in issue in these proceedings.

The complainant contends that the unreasonableness and discriminatory nature of the fare of 10 cents is shown by the fact that for materially greater distances than that from Fourteenth and Farnam streets in Omaha to any point in Council Bluffs, or the reverse, the fare is but 5 cents; that it is only when the bridge is crossed that the 10-cent fare is charged. It is also contended that at other points of crossing of the Missouri or Mississippi rivers, where conditions are similar to those involved in this case, a fare of 10 cents entitles passenger to transfer to any point in either city.

Defendants argue that to reduce the fare to 5 cents would have the effect of abolishing the bridge toll in favor of persons riding in the cars and leave it in force as to the man who elected to walk over the bridge; that along the line from the east bank of the Missouri River to the city of Council Bluffs for a distance of about 3 miles there is a large territory which is but sparsely settled and from which but little revenue is derived; that a reduction of the fare to 5 cents would result in a great reduction of revenue; that notwithstanding the profit for the year 1907 of $49,844.35 on the bridge company's property a reduction of the fare to 5 cents would be disastrous and would result in a net loss of $53,056.55, there being no evidence that a reduction of the fare would be followed by increased travel; that there is greater hazard in the operation of the lines over the bridge than upon the surface; that the commutation tickets are sold on a plan sufficiently liberal to answer the demands of the community; that it is the prevailing custom to charge 10 cents single fare on street-railway lines between cities on the opposite sides of the Mississippi and Missouri rivers, including bridge fare; that the right to charge a 10-cent fare, including the bridge toll, has been recognized by Council Bluffs in the charters granted to the respective street-railway companies whose franchises and lines compose the present lines operated in Council Bluffs by the defendants, and that the fare across the river on railway bridges between Omaha and Council Bluffs is 25 cents.

It appears that prior to leasing the Bridge Company's properties to the Street Railway Company the Bridge Company was operated at a loss, and that it was operated at a loss during the first two
47 years under the lease. Beginning with the year 1905, however, the Bridge Company yielded an annual profit from operation, and that profit increased each year. This is accounted for by economies in management, such as maintenance of one central power house, central shops, one executive organization, etc., and the development of profitable business.

Comparisons are introduced showing the relative conditions of operation, travel, fares, and service in the instant case and at other places where bridge lines connect cities on opposite banks of the Missouri or Mississippi rivers. Statements of defendant's capitalization, earnings, and expenses have also been submitted, which show, on the whole, liberally profitable returns.

The capitalization of the Bridge Company is entirely separate and distinct from that of the Street Railway Company. If the properties were operated separately, neither of them would be expected to charge less than a 5-cent fare. Such combination fare of 10 cents would, doubtless, however, entitle passenger to transportation to or from points in Omaha other than those located upon the loop.

A full hearing has been had in this cause; we have carefully considered the testimony and the record in the case, and we are of the opinion that a reduction of defendants' fare of 10 cents to 5 cents would not be justified, but that limiting the 10-cent fare to points on the loop in Omaha is unjust and unreasonable, and that the fare from Council Bluffs, not including Cortland Beach, to any point on defendants' lines in Omaha or from any point on defendants' lines in Omaha to Council Bluffs, not including Cortland Beach, should not exceed 10 cents for a continuous trip or for a trip upon which passenger conforms to proper and reasonable regulations governing use of transfer tickets if transfer is required.

An order will be entered in accordance with these views.

PROUTY, *Commissioner*, concurring:

In Willson v. Rock Creek Ry. Co., 7 I. C. C. Rep., 83, I expressed the opinion that the act to regulate commerce did not apply to ordinary street railways. I still entertain the same opinion, but a majority of the Commission thought otherwise in that case, and for the twelve years since we have uniformly adhered to that holding. It seems to me that this should be accepted as the settled law for this body until reversed by a majority of the Commission or disapproved by a court of competent jurisdiction. I therefore concur in the disposition of this case. Knapp, Chairman, and Cockrell, Commissioner, instruct me to say that they also doubt upon the point of jurisdiction, but concur for the reason above stated.

48 CLEMENTS, *Commissioner*, concurring:

While concurring fully in the conclusion of the Commission respecting its jurisdiction of the defendants and the questions involved, and approving the order made against the limitation of the 15-cent fare referred to, I do not feel satisfied that the 10-cent fare

complained of is reasonable and just. Respecting this question it does not appear to me that sufficient investigation has been made for a satisfactory determination of the matter. A valuation of the properties involved would have been greatly helpful, and, in my judgment, should have been made in view of the meager and unsatisfactory showing contained in the record as it stands.

49 And afterwards, to wit, on the 25th day of April, 1910, there was filed and entered in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain order, in the words and figures following, to wit:

Temporary Restraining Order.

50 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Mr. John Lee Webster, for Complainants.
Mr. P. J. Farrell and Mr. Charles A. Goss, for Defendant.

Order.

The motion of the complainants for preliminary injunction was argued by counsel for the respective parties before Sanborn, Hook and Adams, Circuit Judges and

Whereas the complainants are street railway companies engaged in operating street cars for the transportation of passengers on the streets of Omaha & Council Bluffs and are not commercial railroad companies engaged in the general transportation of freight and passengers and the Interstate Commerce Commission by its order dated November 27, 1909, required them to cease demanding or receiving their fares of fifteen cents per passenger for the transportation of passengers from Council Bluffs, not including Courtland Beach, Iowa, to points on complainants' lines in Omaha, Nebraska, or from points on defendants' lines in Omaha, Nebraska, to Council Bluffs, Iowa, not including Courtland Beach, Iowa, and also required them to establish and to maintain for two years a less rate,

51 And whereas, the Judges are of the opinion that the Congress never intended that the act to regulate commerce of February 4, 1887, 24 Stat. Chap. 104, Page 379, 3 U. S. Comp. Stat., Page 3154, or its amendments, 34 Stat., Chap. 3591, Page 584, should apply to, and they are of the opinion that they do not apply to, such street railway companies, that no power has been delegated thereby to the Interstate Commerce Commission to regulate or affect the rates of transportation of such companies and that the order of the Interstate Commerce Commission was beyond its powers and ought not to be enforced during the pendency of this

suit. Louisville & Portland Ry. Co. v. Louisville City Ry. Co., 2 Duv. (63 Ky.) 175, 178; Funk v. St. Paul Ry. Co., 61 Minn. 435, 437, 441; State v. Duluth Gas & Water Co., 76 Minn. 96, 108; Manhattan Trust Company v. Sioux City Cable Ry. Co., 68 Fed. 82, 86; Congressional Record, Vol. 17, Part IV, page 3472; Railroad Commissioners v. Market Street R. R. Co., 132 Cal. 677, 678-9, 682, 683, 64 Pac. 1065; Gyer v. West Philadelphia Ry. Co., 136 Pa. St. 96, 108; State of Kansas v. Grant Cain, 69 Kan. 186, 189, 190; Railroad Company v. Railroad Commissioners, 73 Kan. 168, 169, 173; Sams v. St. Louis, etc., Ry. Co., 174 Mo. 53, 64, 69, 74-77, 81; Thompson-Houston, etc., Co. v. Simon, 20 Ore. 60, 75, 25 Pac. 147, 149; Front Street Cable Ry. Co., v. Johnson, 2 Wash. 112, 25 Pac. 1084, 1085; Riley v. Galveston City R. R. Co., 35 S. W. 826, 827.

It is hereby ordered that the aforesaid order of the Interstate Commerce Commission of date November 27, 1909, be, and the same is hereby, suspended and the Commission, its attorneys, agents and employees are hereby restrained and enjoined from enforcing it until the final decision of this suit or the further order of the court.

This order shall take effect upon the filing with the clerk of this court of a bond in the sum of ten thousand dollars ($10,000.) approved by one of the Judges of this court and conditioned
52 that the complainants will pay any and all damages which result from the making of this order in case the order shall not be sustained.

WALTER H. SANBORN,
WILLIAM C. HOOK,
ELMER B. ADAMS,
U. S. Circuit Judges.

53 And afterwards, to wit, on the 29th day of April, 1910, there was filed and entered in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain injunction bond, in the words and figures following, to wit:

Injunction Bond.

54 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Injunction Bond.

Whereas, in the above entitled cause a preliminary order of injunction has been granted enjoining the enforcement of an order of the Interstate Commerce Commission, dated November 27, 1909, relating to fares to be charged for transportation of passengers by the complainant street railway companies and which order reads as follows:

"It is hereby ordered that the aforesaid order of the Interstate Commerce Commission of date November 27, 1909, be, and the same is hereby, suspended and the Commission, its attorneys, agents and employees are hereby restrained and enjoined from enforcing it until the final decision of this suit or the further order of the court."

"This order shall take effect upon the filing with the clerk of this court of a bond in the sum of ten thousand dollars ($10,000.) approved by one of the Judges of this court and conditioned that the complainants will pay any and all damages which result from the making of this order in case the order shall not be sustained."

Now, therefore, this undertaking made and entered into this the 27th day of April, 1910, witnesseth that we, Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company, as principals, and we, Gurdon W. Wattles and Frank T. Hamilton, as sureties, do jointly and severally promise and undertake to and with the clerk of the United States Circuit Court, for the District of Nebraska, for the benefit of whom it may concern in the sum of Ten Thousand ($10,000.00) Dollars that Omaha & Council Bluffs Street Railway Company and Omaha & Coun-
55 cil Bluffs Railway & Bridge Company will well and truly pay any and all damages which may result to any person or persons whomsoever by reason of the granting of said order of injunction in the event that said order of injunction shall not be sustained.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY,
By G. W. WATTLES, *President.*
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY,
By J. H. MILLARD, *President.*
G. W. WATTLES, *Surety.*
F. T. HAMILTON, *Surety.*

Dated this the 27th day of April, 1910.

Approved this the 27th day of April, 1910.
WALTER H. SANBORN,
Circuit Judge.

56 In the Circuit Court of the United States Within and for the District of Nebraska, Omaha Division.

No. 241, "Y."

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY
vs.
INTERSTATE COMMERCE COMMISSION.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of said Court hereby certify that the "Filings-Proceedings" hereinafter mentioned is a true and correct

record of all the transactions and proceedings had in the above entitled cause, to-wit:

Date. Month-Day-Year.	Filings-Proceedings.
Feb. 7, 1910.	Filed Bill of Complaint.
" 14, " "	Filed Certificate of Attorney-General—Made 4 certified copies thereof for Circuit Judges.
" 26, " "	Filed Notice of hearing for Temp. Injunction.
" 26, " "	Filed Order of Judge Sanborn fixing date of hearing.
Mch. 3, " "	Filed Præcipe for Appearance of P. J. Farrell as solicitor for defendant.
" 3, " "	Entered appearance of P. J. Farrell in order book.
" 3, " "	Filed Demurrer and Answer of defendant.
April 25, " "	Filed Temporary Restraining Order, signed by Circuit Judges Sanborn, Hook & Adams.
" 29, " "	Filed Injunction Bond.

Witness my hand and the seal of said Court at Omaha, this 28th day of February, A. D. 1911.

[Seal of the United States Circuit Court.]

GEO. H. THUMMEL, *Clerk.*

57 And afterwards, to wit, on the 6th day of March, 1911, the said cause having been transferred to the United States Commerce Court in accordance with Section 6 of the act of Congress approved June 18, 1910, the originals of all papers and a certified transcript of all record entries in the cause or proceeding up to the time of transfer, were filed in the United States Commerce Court.

58 And afterwards, to wit, on the 3d day of April, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order Permitting the United States to Intervene.

59 In the United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, Respondent.

In said cause the United States moves the Court that it be permitted to intervene and to become a party respondent; and it appearing to the Court that said cause involves public interests, the motion is al-

lowed, and the United States is made a party respondent accordingly, and it is granted thirty days within which to make defense, either by motion or answer, but defense shall be made in such time as not to delay the hearing of the cause.

MARTIN A. KNAPP,
Presiding Judge.

April 3, 1911.

60 And afterwards, to wit, on the 2d day of May, 1911, came the United States, intervener, by its Attorney General, and filed in the clerk's office of the United States Commerce Court, in said entitled cause, its certain motion, in the words and figures following, to wit:

Motion of United States to Dissolve Restraining Order.

61 In the United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
v.
INTERSTATE COMMERCE COMMISSION.

Motion of the United States to Dissolve the Restraining Order and Injunction Heretofore Issued and to Dismiss the Petition.

The Attorney General of the United States of America, in behalf of the United States, Intervener, moves the Court to dissolve the restraining order and injunction heretofore issued in the above entitled cause and to dismiss the petition, upon the following grounds, viz:

(1) It appears from the said petition that the same is insufficient in that it does not set forth any cause of action upon which the Court may grant the relief prayed or to any part of the same.

(2) It appears from the said petition that the said petitioners have not shown that there is any equity in their said petition upon which to grant the relief prayed, or that they are entitled to the relief prayed or to any part of the same.

(3) It appears from the said petition that the said petitioners have not, in and by their said petition, shown that in making its said order the Interstate Commerce Commission acted without its jurisdiction or exceeded any power or authority conferred upon it by the Act to Regulate Commerce.

(4) It appears from the said petition that the said petitioners have not in and by their said petition shown that in making said order the Interstate Commerce Commission violated any right of the petitioners protected by the Constitution of the United States, or any other right of the said petitioners over which this Court may exercise jurisdiction.

62 (5) It appears from the face of the said petition that the same is in other respects, which will be pointed out upon the

hearing of this motion, insufficient to entitle the petitioners to the relief prayed or to any part of the same.

Wherefore, The Intervener prays that its motion be sustained and that the petition be dismissed at the petitioners' cost and for such other and further action as may be appropriate.

GEO. W. WICKERSHAM,
Attorney-General of the United States.

63 And afterwards, to wit, on the 5th day of May, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain appearance, in the words and figures following, to wit:

Appearance of Charles W. Needham.

64 In the United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
v.
INTERSTATE COMMERCE COMMISSION, Respondent.

Appearance.

To Mr. George F. Snyder, Clerk of said Court:

I hereby enter herein my appearance as Attorney for the Interstate Commerce Commission, respondent.

CHAS. W. NEEDHAM,
Attorney for Interstate Commerce Commission.

Dated May 5, 1911.

65 And afterwards, to wit, on the 26th day of May, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order Granting United States Leave to Withdraw Motion, etc.

66 In the United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
v.
INTERSTATE COMMERCE COMMISSION, Respondent.

On motion of the United States, Intervener, by its counsel, in open court made, it is ordered that leave be and the same is hereby given the said intervener to withdraw its motion to dissolve the tem-

porary restraining order and to dismiss the said cause and to adopt the grounds of the demurrer of the Interstate Commerce Commission filed in said cause as the objections of the United States to the sufficiency of Paragraphs 1 to 9, inclusive, and Paragraphs 11 to 24, inclusive, of the said petition; and to adopt the answer of the Interstate Commerce Commission filed in said cause as the answer of the said intervener to Paragraph 10 of the said petition.

MARTIN A. KNAPP,
Presiding Judge.

67 And in the record of the proceedings in the United States Commerce Court for the 26th day of May, 1911, appears the following entry, to wit:

Cause Taken under Advisement.

68 No. 25.

OMAHA & COUNCIL BLUFFS ST. RY. CO. et al., Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, Respondent.

Thereupon, said cause came on for final hearing upon the merits, and the arguments of counsel were concluded; John L. Webster, Esquire, appearing on behalf of the petitioners and Blackburn Esterline, Esquire, on behalf of the United States, and Dr. Charles W. Needham on behalf of the Interstate Commerce Commission. Thereupon said cause was taken under advisement by the Court.

69 And afterwards, to wit, on the 5th day of October, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain opinion, in the words and figures following, to wit:

Opinion.

70 United States Commerce Court, May Session, 1911.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
v.
INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

On Bill and Demurrer.

For opinion and order of the Interstate Commerce Commission, see 17 I. C. C. Rep., 239.

For opinion of Circuit Court granting preliminary injunction, see 179 Fed., 243.

Mr. John Lee Webster, for petitioners.
Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.
Dr. Charles W. Needham, for Interstate Commerce Commission.

Before Archbald, Hunt, Carland, and Mack, Judges.

71 [OCTOBER, 5, 1911.]

MACK, *Judge:*

The Omaha & Council Bluffs Railway & Bridge Co., hereinafter referred to as the bridge company, an Iowa corporation constructed, under authority of an act of Congress (act Mar. 3, 1887, 24 Stat., c. 356, p. 501), and now owns a joint railroad, wagon, and foot toll bridge over the Missouri River at Omaha, Nebr., and Council Bluffs, Iowa, and also owns a railway, which begins at the west end of the bridge in Omaha, Nebr., and extends eastward across the bridge to Council Bluffs, Iowa. The bridge company also owns the stock and bonds of the Omaha, Council Bluffs & Suburban Railway Co., a street railway line in Council Bluffs. The Omaha & Council Bluffs Street Railway Co., hereinafter referred to as the street railway company, owns and operates all of the street railway lines in Omaha, Nebr., in addition to which, in January, 1903, it leased all of the properties of the bridge company for a period of years, so that it now operates all of the lines of both systems.

Foot passengers pay 5 cents bridge toll; local street car fare in either city is 5 cents; interstate street railway passengers pay no direct bridge toll but a single fare of 10 cents, or $1.50 for 30 commutation tickets, for a ride to or from any point on the line in Council Bluffs, except Courtland Beach, over the bridge from or to any point on the line of the street railway company within the so-called loop in Omaha. Interstate passengers to or from a point in Omaha beyond the loop receive no transfers, but according to the prac-
72 tice sought to be corrected are required to pay an additional local fare of 5 cents. The loop district in Omaha extends westward on Douglas to Fourteenth Street, south upon that street to Howard, east to Eleventh, north to Douglas, and eastward back to the bridge.

On complaint the Interstate Commerce Commission refused to reduce the 10-cent fare to 5 cents, but abolished the loop limitation in Omaha, ordering the bridge and street railway companies not to charge more than 10 cents to or from any point on the line in Omaha from or to Council Bluffs, except Courtland Beach. The report of the commission will be found in 17 Interstate Commerce Commission Reports, 239. A bill was thereupon filed in the Circuit Court of the United States for the District of Nebraska, and a preliminary injunction was granted against the enforcement of this order. (Omaha & C. B. St. Ry. Co. v. I. C. C., 179 Fed., 243.) The case was subsequently transferred to this court and is now up for disposition on a demurrer to the bill, except as to one paragraph, which is answered by adding to the order of the commission its report, thus making the latter a part of the record.

On the oral argument, though not in the briefs, it was suggested, in accordance with the charges of the bill, that the order of the commission, in practically compelling the street railway company to give transfers in Omaha, went both beyond the issues in the case before the commission and beyond its constitutional as well as its
73 statutory powers in that it thereby attempted to regulate the strictly intrastate affairs of the street railway company by an order which had no reference to the transportation over the bridge, but to what should happen after it was complete, compelling the company in effect to render an additional service without compensation. But the complaint before the commission was that the 10-cent fare between Council Bluffs, Iowa, and Omaha, Nebr., was unreasonable and unjust, and it was prayed that the defendants be required to make and fix passenger fares to apply in future to the transportation of passengers from Council Bluffs to Omaha, and the reverse, which should not exceed 5 cents per passenger or such charge as the commission should find reasonable and just. The report recited that the complainant assailed the 10-cent fare between the two cities over the bridge as unreasonable and prayed that "no extra charge be made when in the course of interstate transportation passengers are carried over such bridge," and the establishment of a 5-cent fare.

While the primary object aimed at was the reduction of the 10-cent fare to 5 cents, the prayer for the abolition of all extra charges and the fixing of a reasonable rate for interstate passenger transportation between the two cities fairly included, in our opinion, the elimination of the loop boundary for the 10-cent fare. Moreover, the commission expressly states in the report that "the rea-
74 sonableness of confining it (the 10-cent fare) to points on the loop is put in issue in these proceedings."

The lines from the bridge in Omaha to and through the loop do not constitute a system separate and distinct from those beyond the loop. Both are under the common ownership, control, and operation of the street railway company. Local passengers pay a single fare within the city of Omaha between all points, receiving the necessary transfers at junction points to and from the loop.

The question presented was, therefore, not whether an independent company operating solely in Omaha beyond loop points and exchanging transfers solely for local passengers with an interstate company operating the loop lines could be compelled to give transfers to interstate passengers as well—as to which we intimate no opinion—but whether or not the interstate company, operating all the lines as one system, the parts of which are independently operated only in a physical sense, in that transfers are necessary from and to the loop, could be compelled, without additional compensation, to carry an interstate passenger to a point on its own lines beyond the loop district; in other words, whether 15 cents is or is not a reasonable fare to be paid for the entire interstate journey made on the several lines operated by the street railway company. So stated, the question is obviously one of the reasonableness of interstate passenger rates, and as such clearly within the jurisdic-
75 tion of the commission, if it has any jurisdiction over corporations such as the street railway company.

Complainants do, however, allege—and this brings us to a consideration of the principal and important question in the case—that the Interstate Commerce Commission, under the act, has no jurisdiction over interstate passenger rates charged by a corporation engaged in the business in which the street railway company is engaged here.

The judges of the Circuit Court before whom the case originally came, in granting a preliminary injunction, held that the complainants were street railway companies engaged in operating street cars for passenger transportation, and not commercial railroad companies engaged in the general transportation of freight and passengers, and as such did not come within the class of corporations over whose rates the Interstate Commerce Commission has been granted jurisdiction. The cases cited in support of this view involved the interpretation of various State acts establishing commissions, regulating taxes, providing for joint rates or connections, giving mechanics' liens, abolishing the fellow-servant rule, or in other ways dealing with railroad problems. Under these statutes it was held that in as much as commercial railroads and street railways were classified separately by the legislatures, electric street railways would
76 not be deemed to be embraced within the general term "railroad," as used in such acts. The principal of these cases, which cite the others, are R. R. Commission v. Market Street R. R. Co., 132 Cal., 677 (65 Pac., 1065) and Sams v. St. Louis, etc., Ry. Co., 174 Mo., 53 (73 S. W. Rep., 686). In each of these there was a vigorous dissenting opinion.

No court decision has been found directly involving an interpretation on this point of the Federal act to regulate commerce, although in the Employers' Liability cases (207 U. S., 463, at 497) Mr. Justice (now Chief Justice) White said: "From the first section it is certain that the act extends to every individual or corporation who may be engaged in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridge, wagon lines, carriages, trolley line, etc."

The conclusion of the Interstate Commerce Commission that it has such jurisdiction is supported by its earlier decision in Willson v. Rock Creek Ry. Co. (7 I. C. C. Rep., 83) and by its later decision in Beall v. Washington, Alexandria & Mt. Vernon Ry. Co. (20 I. C. C. Rep., 406). While two commissioners dissented as to the jurisdictional question in the Rock Creek Ry. Co. case in
77 1897, all concurred in the order which is sought to be enjoined in the present case, Prouty, C., speaking as well for Commissioners Knapp and Cockrell as for himself, making the following statement: "In Willson v. Rock Creek Ry. Co. (7 I. C. C. Rep., 83) I expressed the opinion that the act to regulate commerce did not apply to ordinary street railways. I still entertain the same opinion, but a majority of the commission thought otherwise in that case, and for the 12 years since we have uniformly adhered to that holding. It seems to me that this should be accepted

as the settled law for this body until reversed by a majority of the commission or disapproved by a court of competent jurisdiction."

The fact that the opinion of the majority of the commission in the Rock Creek Railway Co. case has been acted on for so many years should compel us to hesitate before adopting an interpretation of the act contrary to that of the commission. On the other hand, the opinion of such experienced judges as granted the preliminary injunction in the present case and the doubts of our colleague, the presiding judge of this court, while chairman of the commission, and of his two associates, necessitate a careful examination of the question in the endeavor to ascertain whether or not, even though certain words literally construed may be held to grant the jurisdiction, a reasonable interpretation of the entire act, in the light
78 of its history and of the evils sought to be remedied and of the later amendments, supports the literal construction; in a word, whether sound interpretation of both the spirit and the letter of the statute sustains the jurisdiction of the commission.

There is no question that Congress could have granted jurisdiction over interstate street railway companies carrying only passengers. Neither is it controverted that, under the act, the commission has jurisdiction over some corporations engaged in interstate transportation of passengers alone, as well as over some corporation engaged in interstate transportation using electricity instead of steam as the motive power. But it is argued that, as the act itself shows, Congress never intended to exercise its power of regulation over all persons or corporations engaged in interstate transportation (having expressly excluded water carriers, for instance, except where operating in direct connection with a railroad under a common arrangement for continuous carriage); that the evils which compelled the intervention of Congress were due to the acts and omissions of the great railroad systems; that street railways in 1887 were ordinarily purely local and municipal, operated mostly by animal power and fully regulated by municipal ordinances; that many of the provisions of the act are entirely inapplicable to street railways; that commercial railroads, operated ordinarily by steam and vested with rights of eminent domain, are generally
79 differentiated in legislation from street railways operated today ordinarily by electricity, generally not endowed with the right of eminent domain, and running usually upon city streets and public highways and not on private property; and that for these, as well as for other reasons, electric interurban passenger street railways are not included within the classes of common carriers over which jurisdiction was granted by sec. 1 of the act. The relevant part of this section as it was in force when these proceedings were begun in the Circuit Court is copied.*

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* SEC. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be

considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent country: Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this act shall include express companies and sleeping car companies. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.

80 Intermediate between the ordinary urban street railways which, in the case of cities or towns near each other, whether in the same State or not, become State or interstate interurban surface railways carrying only passengers, and the commercial railroads carrying passengers and freight and operated usually by steam, are the so-called interurban electric roads. These have been organized, or at any rate have become important factors in transportation, since 1887. They usually carry mail, express matter, and some freight as well as passengers, and do not only a local business in more than one city and between cities but also between city and country. It is conceded by counsel that corporations operating such roads, even though differing in many respects from so-called commercial railroads, come within the jurisdiction of the commission when engaged in interstate transportation. The commission so held in C. & E. Elec. R. R. Co. v. I. C. R. R. et al. (13 I. C. C. Rep., 20) and C. & C. Traction Co. v. B. & O. S. W. R. R. Co. (20 I. C. C. Rep., 486). In Nebraska and some other States

corporations operating such interurban roads are, moreover, created under the general railroad acts.

The present street railway company differs from this class of interurban roads in that it is created under the street railway act of Nebraska; it does not and is not empowered to carry freight; and, moreover, unlike some interurban roads, it has no right of
81 eminent domain. Like these, however, it carries mail; it serves not one but two cities and several towns, villages, and resorts; and though the bill of complaint alleges that the rails of the street railway company are all on streets and highways, it does not deny the statement in the report of the commission, referring probably to the leased lines of the bridge company, that the rails are not all laid in streets and highways, but for some distance run over private right of way and over the bridge across the Missouri River.

While, as complainant urges, the Nebraska corporation is the only party actually affected by the order, nevertheless the order is directed against it not in relation to its business as a local Nebraska street railway corporation, but to its business as a carrier engaged in interstate transportation. As such carrier it is the successor of the Iowa corporation, the bridge company. Whatever may be the latter's charter limitations as an Iowa corporation, it erected the bridge and the lines thereon (both now leased to and operated by the street railway company) under power granted to it by Congress to construct, operate, and maintain the bridge and a "steam, electric * * * or other line of railway."

Whether or not the street railway company is empowered as a Nebraska corporation to operate the bridge and the Iowa lines is immaterial in this case; it is, rightly or wrongly, engaged in
82 their operation, and it is, therefore, a common carrier engaged in the interstate transportation of passengers by electric railway.

It is likewise immaterial to this inquiry, that the street railway company is created under the street railway and not under the commercial railroad act of Nebraska. If, soundly interpreted, the Federal act gives the commission jurisdiction over such electric railways, State legislation is powerless to limit or to prevent such grant.

Does, then, the lack of statutory power to carry freight and to exercise the right of eminent domain, so differentiate such a corporation as this street railway company from the modern interurban roads, as to exempt it from the jurisdiction of the commission?

Great stress is laid upon a statement by Senator Cullom, chairman of the Senate committee, when the original act of 1887 was under consideration (Cong. Rec., vol. 17, pt. 4, p. 3472), that: "The bill is not intended to affect the stagecoach, the street railway, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects."

But whatever view may have been so expressed, it can not determine the correct interpretation of the act, particularly as it now stands, with all the changes that have been introduced since 1887.

83 If the language be broad enough to include such a corporation as the present street railway company, and there is no contention but that "railroad" may be and frequently is synonymous with or inclusive of "street railways," it is, moreover, immaterial that Congress may not specifically have intended to confer jurisdiction over the few comparatively insignificant interstate horse street railways of 25 years ago.

A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted—any more than the Constitution—in accordance with the economic or physical conditions prevailing at the time of its adoption. Then, too, the decision in Wabash, St. Louis, etc., Railway Co. v. Illinois (118 U. S., 557), definitely denying to the States the right to fix or regulate interstate rates for passengers, and thereby necessitating some congressional action, is as applicable in its reasoning to interstate street railway rates as to those of commercial railroads. Unless the commission has jurisdiction over those rates they are absolutely uncontrolled.

As noted above, while Congress has expressly excluded water carriers, except when operated in direct connection with a railroad, it has not expressly excluded street railways. Moreover, the act has been several times amended since the Rock Creek Railway Co. case; and not only has Congress thus by its failure to exclude street
84 railways apparently concurred in the construction there given, but by the latest amendment it has, in fact, given its apparent sanction thereto.

In 1910 section 15 of the act was amended to read: "The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character," which is the first specific mention of street electric passenger railways. This proviso, following the grant of power to establish through rates, etc., between railroad carriers, would have been totally unnecessary unless the commission had theretofore had jurisdiction over street electric passenger railways. Congress, therefore, must have enacted the legislation of 1910 upon the assumption that such jurisdiction had been conferred upon the commission by the original act.

The argument that many of the requirements of the act would be impossible of accomplishment by street railways does not impress us, inasmuch as this is at least equally true of sleeping-car companies, pipe lines, telegraph and telephone companies, all of which are expressly covered by the statute. As to each of them only such of its provisions as are applicable will be deemed to refer to such companies, respectively.

85 The frequent repetition of the phrase "passengers or freight" clearly indicates that a carrier of passengers only is as subject to regulation by the commission as is a carrier of both freight and passengers.

Finding substantially nothing either in the language of the statute or in the history of this legislation that indicates an intent to

exclude interstate passenger street railways from its operation, and finding, on the contrary, that the words of the act are broad and comprehensive enough to include them and that some at least of the evils sought to be remedied by this legislation can be corrected only if the commission have such jurisdiction, we are compelled to differ from the views expressed by the Circuit Court in granting the preliminary injunction, and to hold that power has been delegated to the commission to regulate rates of transportation by such companies as the complainants herein, which requires us to sustain the demurrer of the defendants and to dismiss the bill. And it is so ordered.

86 And afterwards, to wit, on the 13th day of October, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order Sustaining Demurrer and Dismissing Bill.

87 United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

This cause coming on to be heard on the 26th day of May, A. D. 1911, on Bill filed February 7th, 1910 and on Demurrer and Answer of Interstate Commerce Commission filed the 3d day of March, A. D., 1910, and having been argued by counsel, Mr. John Lee Webster appearing for the Petitioners, Mr. Blackburn Esterline for the United States, and Mr. Charles W. Needham for the Interstate Commerce Commission, and upon due consideration thereof, it is now this 13th day of October, A. D., 1911, ordered, adjudged and decreed that the said above referred to Demurrer of the Respondent be and the same is hereby sustained and that the Bill of Complaint herein be and the same is hereby dismissed.

By the Court:

MARTIN A. KNAPP,
Presiding Judge.

88 And afterwards, to wit, on the 23d day of October, 1911, came the petitioners in said entitled cause, by their solicitor, and filed in the clerk's office of the United States Commerce Court, their certain assignment of errors, in the words and figures following, to wit:

Assignment of Errors.

89 United States Commerce Court.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant, and UNITED STATES, Intervenor.

Assignment of Errors.

Now come Omaha & Council Bluffs Street Railway Company, and Omaha & Council Bluffs Railway & Bridge Company, and make the following assignment of errors to the judgment and order of the court in the above entitled cause:

I.

The court erred in holding that the Interstate Commerce Commission, under the Act to Regulate Commerce, has jurisdiction over Street Railroads and Street Railroad Companies; and whereas the court should have found that the Act to Regulate Commerce does not include Street Railroads and does not confer authority upon the Interstate Commerce Commission to regulate fares or transportation upon Street Railroads.

II.

90 The court erred in holding that the Interstate Commerce Commission had jurisdiction to make its order under date of November 27, 1909, fixing and regulating certain rates of fare upon the plaintiff's street railway lines, between points in the City of Council Bluffs, Iowa, and into and upon the lines of Omaha & Council Bluffs Street Railway Company within the corporate limits of the City of Omaha.

Whereas the court should have held that the order of the Interstate Commerce Commission was void and beyond the scope of its authority in that it requires the Omaha & Council Bluffs Street Railway Company to carry upon its lines within the City of Omaha without compensation, persons who may have paid a fare of ten cents (10¢) to ride from Council Bluffs, Iowa, to Omaha, Nebraska, upon the lines of the Omaha & Council Bluffs Railway & Bridge Company.

III.

The court erred in refusing to grant the injunction prayed for by the plaintiffs, and by its order and decree directing that the plaintiff's bill of complaint be dismissed. Entered under date of Oct. 13, 1911.

JOHN LEE WEBSTER,
Solicitor for Complainants.

91 And on the same day, to wit, the 23d day of October, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain petition for appeal, in the words and figures following, to wit:

Petition for Appeal.

92 United States Commerce Court.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, and Omaha & Council Bluffs Railway & Bridge Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant, and UNITED STATES, Intervenor.

Petition for Allowance of Appeal.

The Complainants, Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company, in the above entitled cause, feeling aggrieved by the order and decree of the court, entered on the 13 day of October, 1911, in the above entitled cause, pray for an order allowing an appeal from the said order, judgment and decree to the Supreme Court of the United States, and that an order be made fixing the amount of security which the complainants shall be required to furnish as a cost bond upon said appeal.

JOHN LEE WEBSTER,
Solicitor for Complainants.

93 And on the same day, to wit, the 23d day of October, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

94 *Order Allowing Appeal.*

It is ordered that the appeal as prayed by the complainants is hereby allowed to the Supreme Court of the United States to review the order and decree hereinbefore entered in said cause and the cost bond is hereby fixed at $500.00.

MARTIN A. KNAPP,
Presiding Judge.

October 23, 1911.

95 And on the same day, to wit, the 23d day of October, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain bond, in the words and figures following, to wit:

Appeal Bond.

96 United States Commerce Court.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and Omaha & Council Bluffs Railway & Bridge Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant, and UNITED STATES, Intervenor.

Cost Bond on Appeal.

Know all men by these presents that we, Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company, as principals, and Gurdon W. Wattles and F. T. Hamilton as sureties are held and firmly bound unto the Interstate Commerce Commission, and all others concerned, in the sum of Five Hundred Dollars to be paid by the complainants subject to the following conditions:

Whereas the complainants in the above entitled cause have sued out and appeal to the Supreme Court of the United States to reverse the order, decree and judgment entered in the United States Commerce Court in said cause on the 13 day of October, 1911.

Now therefore, the condition of this obligation is such that if the said complainants shall prosecute said appeal to effect, and
97 answer all costs if it fails to make said appeal good, then this obligation shall be void, otherwise to remain in full force and effect.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY,
By G. W. WATTLES, *President.*
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY,
By J. H. MILLARD, *President.*
GURDON W. WATTLES, *Surety.*
FRANK T. HAMILTON, *Surety.*

Dated this the 23 day of October, 1911.
Approved this the 23d day of October, 1911.

MARTIN A. KNAPP,
Presiding Judge.

98 *Transcript of Docket Entries.*

United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

Attorneys:

John Lee Webster, for Petitioners.

James A. Fowler, Blackburn Esterline, for the United States.

Chas. W. Needham, P. J. Farrell, for Interstate Commerce Commission.

Proceedings.

1911.

Mar. 6. All papers filed in U. S. Commerce Court.
Apr. 3. Ordered that United States be permitted to intervene, granted 30 days to make defense.
May 2. Motion of United States to dissolve the restraining order and injunction heretofore issued and to dismiss the petition, filed.
May 5. Appearance of Chas. W. Needham for Interstate Commerce Commission, filed.
May 26. Brief for complainants filed.
May 26. Order granting leave to United States, Intervener, to withdraw motion to dissolve temporary restraining order and dismiss cause, and to adopt demurrer and answer of Interstate Commerce Commission, filed.
May 27. Brief and argument on behalf of the Interstate Commerce Commission, filed.
Oct. 5. Opinion filed.
Oct. 13. Order entered sustaining demurrer and dismissing Bill of Complaint.
Oct. 23. Assignment of errors, filed.
Oct. 23. Petition for allowance of appeal, filed.
Oct. 23. Order allowing appeal, filed.
Oct. 23. Cost bond on appeal, filed.
Oct. 23. Citation on appeal, filed.

99 United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 98, inclusive) to be a true and complete transcript of the proceedings had of record in the above entitled cause, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 30th day of October, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

25.

100 United States Commerce Court. Filed Oct. 23, 1911. G. F. Snyder, Clerk.

Citation.

The United States of America to Interstate Commerce Commission, Greeting, and United States, Intervenor, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to an appeal filed in the Clerk's office of the United States Commerce Court, in this suit wherein Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company are appellants, and Interstate Commerce Commission is appellee, to show cause, if any there be, why the judgment, order and decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, appellants, *v.* INTERSTATE COMMERCE COMMISSION AND The United States.	No. 846.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and moves the court to advance the above-entitled case for hearing at this term. The appeal is from a final decree of the Commerce Court dismissing the bill of the railroad companies on demurrer interposed by the commission and the United States.

The principal question is as to the validity of an order of the commission requiring the railroads to reduce their fares from 15 cents to 10 cents.

The operation of the order is at present staye
by a temporary injunction from this court entere
on November 6, 1911.

The priority suggested is authorized by section
of the act of June 18, 1910 (36 Stat. L., 542).

Opposing counsel concur in this motion.

FREDERICK W. LEHMANN,
Solicitor General.

JANUARY, 1912.

O

Supreme Court U. S.
FILED
OCT 30 1911
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. ~~948~~ 458.

OMAHA AND COUNCIL BLUFFS STREET RAILWAY COMPANY

AND

OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY,

APPELLANTS,

vs.

INTERSTATE COMMERCE COMMISSION,

DEFENDANT,

AND

UNITED STATES, INTERVENING DEFENDANT,

APPELLEES.

ON APPEAL FROM THE COMMERCE COURT.

Application for a Supersedeas or Order Suspending an Order of the Interstate Commerce Commission to Maintain the Status Quo Pending this Appeal.

JOHN LEE WEBSTER,
Solicitor for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. .

OMAHA AND COUNCIL BLUFFS STREET RAILWAY COMPANY

AND

OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY,

APPELLANTS,

vs.

INTERSTATE COMMERCE COMMISSION,

DEFENDANT,

AND

UNITED STATES, INTERVENING DEFENDANT,

APPELLEES.

ON APPEAL FROM THE COMMERCE COURT.

Application for a Supersedeas or Order Suspending an Order of Interstate Commerce Commission to Maintain the Status Quo Pending this Appeal.

Now come Omaha and Council Bluffs Street Railway Company and Omaha and Council Bluffs Railway and Bridge Company, appellants, and

make this their application for an order superseding an order and decree of United States Commerce Court entered October 13, 1911, and suspending an order of Interstate Commerce Commission entered under date of November 27, 1909, during the pendency of this appeal, and in support hereof state the following reasons and facts:

First. Omaha and Council Bluffs Street Railway Company, hereafter spoken of as Street Railway Company, is a corporation of the State of Nebraska, incorporated under the constitution and laws of said State relating to the incorporation of street railroads, and owns and operates the street railway lines in the city of Omaha, Nebraska.

Omaha and Council Bluffs Railway and Bridge Company is incorporated under the laws of the State of Iowa as a street railroad company, and hereafter spoken of as the Bridge Company, and owns the street railway lines in the city of Council Bluffs, in the State of Iowa, and a line extending from said city to and over a bridge across the Missouri river into the city of Omaha.

Second. The street cars on the line of said Bridge Company pass upon and along the streets of the city of Council Bluffs and thence to the Missouri river and over the bridge and upon and around a "loop" in the city of Omaha, and thence returning to the city of Council Bluffs, but said cars are not operated upon or along the lines of

the Street Railway Company throughout the corporate limits of the city of Omaha. Passengers from Council Bluffs desiring to go to points in the city of Omaha beyond the said "loop" leave the cars of the Bridge Company and enter upon cars of the Street Railway Company, and thereupon pay separate fare for transportation on the lines of the Street Railway Company. In December, 1902, the Street Railway Company leased the lines of the Bridge Company, but nevertheless since said date the lines of the two companies are operated just as they have been operated before the said lease, as two independent and distinct companies, the cars of one line not passing upon or over the tracks of the other, but transfer from the lines of one company to the lines of the other company in passing from Council Bluffs, Iowa, to Omaha, Nebraska. A flat fare of ten cents is charged from Council Bluffs, Iowa, to Omaha, Nebraska, which includes the fare across the bridge. The Street Railway Company charges a flat fare of five cents on its lines between all points.

Third. The Interstate Commerce Commission, under date of November 27, 1909, made an order requiring the appellant companies, on or before February 1, 1910, to put in force during a period of not less than two years a fare not exceeding ten cents from any point in Council Bluffs, Iowa, to any point within the corporate limits of the city

of Omaha. Said order, in its practical effect, is to require the Street Railway Company in Omaha to receive and carry upon its lines, without compensation, a passenger who may have paid a ten-cent fare to the bridge line for transportation from Council Bluffs into Omaha.

Fourth. The two points of error presented on the appeal are:

(*a*) That the Interstate Commerce Commission had no jurisdiction over "street" railroads.

(*b*) In any event the Interstate Commerce Commission had no authority to make the order directing the Street Railway Company of Nebraska to receive and transport passengers, who may elect to get on its cars, without compensation, simply because such passengers may have paid a ten-cent fare to the Bridge Company for transportation from Council Bluffs, Iowa, into the city of Omaha.

Fifth. In the opinion of the Interstate Commerce Commission (17 I. C. C. Rep., 239) Commissioners Prouty, Knapp, and Cockrell were of the "opinion that the Act to Regulate Commerce did not apply to ordinary street railways," and so expressed themselves in an addendum to the opinion.

Sixth. The appellants herein filed their bill in United States Circuit Court for the District of Nebraska *versus* the Interstate Commerce Com-

mission, praying for an injunction against the enforcement of the said order of the Interstate Commerce Commission on the ground that the said order was made without authority in the Interstate Commerce Commission to make the same for the reasons above stated. To the said bill of complaint the Interstate Commerce Commission filed its demurrer, and thereupon the same came on for hearing for a temporary injunction before Circuit Judges Sanborn, Adams, and Hook. The matter was argued orally and upon printed brief by the solicitors for the respective parties, and the said judges, after retaining the matter under consideration for some two or three weeks, handed down a written opinion and order, holding that the Interstate Commerce Commission did not have jurisdiction over complainant street railway companies, on the ground that street railway companies were not "railroads" within the meaning of the Interstate Commerce Act, and granted a temporary injunction as prayed, upon giving of bond in the sum of ten thousand dollars, and which was done. For a report of said opinion and order of injunction see Omaha and Council Bluffs Street Railway Company *versus* Interstate Commerce Commission, 179 Federal, 243.

Said case was transferred to the United States Commerce Court by operation of law, and thereupon the United States intervened and also filed its demurrer to the bill of complaint, and said case was heard in said court upon the appellants' bill

of complaint and the demurrers of the Interstate Commerce Commission and of the United States thereto; and in due course the said Commerce Court on the same pleadings and on the same facts held that the Interstate Commerce Commission did have jurisdiction to make said order upon the ground that the word "railroad" in the Interstate Commerce Act did include ordinary street railways, and further holding that the said order was not void by reason of the fact that it required the Street Railway Company in Omaha to receive and carry, without additional compensation, the passengers who had paid a ten-cent fare over the said bridge line, and thereupon said Commerce Court entered its order, under date of October 13, 1911, dismissing complainant's bill of complaint. (Judge Knapp did not sit in said case nor take part in the decision thereof.)

Seventh. The appellants, by their solicitor, John Lee Webster, personally applied to the presiding judge of the Commerce Court, and to Judge Mack, the writer of the opinion, to know if the said court would not, under the circumstances, enter an order continuing the temporary injunction or suspending the operation of the order of the Interstate Commerce Commission pending the appeal, but which was not granted, for the reason that the Commerce Court doubted its authority and propriety to make such an order, as your appellants are informed and believe.

Eighth. Section one of the Interstate Commerce Act provides "that the same shall apply to any carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water." The term "railroad" as defined in said act "shall include all bridges and ferries used or operated in connection with any 'railroad.'"

The opening sentence of said section one of said Act to Regulate Commerce also includes corporations or persons engaged in the transportation of oil by means of pipe lines, or partly by pipe lines and partly by railroads, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies. And when said section one refers to common carriers it is to "any common carrier or carriers engaged" in transportation by "*railroad,*" or partly by railroad and partly by water. The words "common carrier" as used in said section one, as the section was originally drafted, applied only to railroads, as above stated, and did not refer to or include common carriers outside of, and distinct from, "*railroads.*" By a subsequent amendment to said section one the term "common carrier" was defined to include "express companies and sleeping car companies." Notwithstanding the various amendments to said section one, including thereby different companies and carriers, no amendment was made in terms including "street" railroads. It was stated by Senator Cullom, in a report to the Senate as chair-

man of the committee having charge of the original Act to Regulate Commerce, that the same was not intended to include "street railroads," stage lines, etc.

Ninth. There are many provisions in the Act to Regulate Commerce which are wholly inapplicable to street railroads and many of which provisions are of a character which cannot be enforced or made to apply to street railroads, such as making switch connections, from one to the other, transportation of cars from one line to the other, the establishment of rates for either freight or passengers from one line to the other.

Street railway companies do not have the corporate authority to transport freight, baggage or express, nor to haul the cars of the commercial railroads, nor to permit the same to pass over their lines.

Tenth. It has been held in the State of Iowa that street railroads in said State are not "railroads" within the general meaning of the law (Fidelity Loan and Trust Company *vs.* Douglass, 104 Iowa, 532), and by the pleadings it stands admitted that the bridge company is incorporated as a street railroad under the laws of the State of Iowa.

Eleventh. Under the constitution and statutes of Nebraska street railroads can only be incorporated to construct and operate lines upon the streets of

cities and for the transportation of passengers only. Their articles of incorporation must set forth the streets and termini thereof, upon and along which the street-car tracks are to be constructed, and the right to do so must first be obtained by a vote of the electors of the city. Such street railways do not possess the power of eminent domain, and are limited to the transportation of passengers only upon and along the streets.

For the appellant street railway company to transport freight or to haul the cars of the commercial railroads upon and along its tracks in the city would be beyond its corporate powers and would subject it to proceedings for the forfeiture of its franchise rights.

Twelfth. It has been held in many States, indeed, in most all the States, that the word "railroad," as found in the constitutions and statutes of the States, does not include street railroads, and that the two classes of corporations are absolutely distinct, and it has likewise been held that a street railroad cannot exercise the corporate powers of a commercial railroad, and that a commercial railroad cannot exercise the powers of a street railway. The authorities to these points are nearly all collated in the opinion of the circuit judges in the case reported in 179 Federal, 243.

Thirteenth. So far as your petitioners are informed and believe, the Interstate Commerce Com-

mission has not heretofore made an order regulating rates of fare upon any strictly street railway company outside of the District of Columbia, and the present case is generally regarded as a pioneer case in which it is desired to settle the law upon the questions in this appeal involved.

Fourteenth. The order of the Interstate Commerce Commission was to become effective February 1, 1910, and was suspended by the injunction granted in this case up until the order of the Commerce Court, October 13, 1910, and the two years' life of the order of the Commission would expire February 1, 1912. To require the appellant street railway companies to comply with the order pending this appeal would put said companies to great embarrassment, inconvenience, and expense, as well as irreparable loss and injury, if it be finally held that the Interstate Commerce Commission was without jurisdiction to make the order. The street railway companies charge flat rates, and there is no way by which the passenger over the bridge line could have a ticket of transfer to the lines of the street railway in Omaha, except by the issuance of a form of transfer tickets, which would require the printing of a new form of transfer ticket to be given only to the passenger from Council Bluffs, or *vice versa,* who paid a ten-cent fare; and passengers who ride on commutation tickets, thirty tickets for one dollar and a half, would not be entitled to such transfers under the

order of the Commission. Again, the mayor and council of the city of Omaha require the street railway companies in Omaha to issue universal transfers to all persons riding on its lines, upon the payment of a five-cent fare. The confusion of transfers, and who are entitled to them, and who not entitled, would create great confusion. Again, the street railway company, if the order should be enforced, would be required to carry hundreds of passengers every day on its lines without the payment to it of the flat fare of five cents paid by all other passengers who get on its cars within the limits of the city of Omaha, and would be without remedy to recover or recoup such fares from the thousands of people whom it would be required to transport between this date and the final hearing on this appeal, if the order of the Commission be not stayed or suspended.

Wherefore the appellants pray this court to grant an appropriate order superseding the judgment and decree of the Commerce Court, and suspending, pending this appeal, the order of the Interstate Commerce Commission made under date of November 27, 1909, regulating the fares upon the appellant companies, upon the giving of such bond as this court shall order and direct in the premises.

OMAHA AND COUNCIL BLUFFS
STREET RAILWAY CO.,
OMAHA AND COUNCIL BLUFFS
RAILWAY AND BRIDGE CO.,
By JOHN LEE WEBSTER, *Solicitor.*

DISTRICT OF COLUMBIA, *ss:*

John Lee Webster, being first duly sworn, deposes and says that he is the general counsel of Omaha and Council Bluffs Street Railway Company and of Omaha and Council Bluffs Railway and Bridge Company, incorporations respectively of the States of Nebraska and Iowa; and affiant further states that the facts stated in the foregoing application are true, and that the additional matters therein stated as upon information and belief or by way or argument and inducement are true as he verily believes.

JOHN LEE WEBSTER.

Subscribed and sworn to before me this 25th day of October, 1911.

[Seal of Eustace C. Owen, Notary Public, District of Columbia.]

EUSTACE C. OWEN.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, appellants, v. INTERSTATE COMMERCE COMMISSION AND The United States, intervener, appellees.	No. 846.

ON APPEAL FROM THE COMMERCE COURT.

SUGGESTIONS IN OPPOSITION TO THE APPLICATION FOR A SUPERSEDEAS.

The opinion of the learned circuit judge, filed October 5, 1911, Appendix, contains a complete and accurate statement of the case and of the questions involved as the same were presented to the Interstate Commerce Commission and the Commerce Court. The report of the Interstate Commerce Commission is found in *West End Improvement Club* v. *Omaha and Council Bluffs Railway and Bridge Company* (17 I. C. C. R., 239). The order

based upon that report and the subject matter of this suit is as follows:

WEST END IMPROVEMENT CLUB *v.* OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY and OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY.	No. 1004.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of February, 1910, from charging, demanding, collecting, or receiving their present fare of 15 cents per passenger for the transportation of passengers from Council Bluffs, Iowa, not including Courtland Beach, Iowa, to points on defendants' lines in Omaha, Nebr., or from points on defendants' lines in Omaha, Nebr., to Council Bluffs, Iowa, not including Courtland Beach, Iowa.

It is further ordered, That the said defendants be, and they are hereby, notified and required to establish, on or before the 1st day of February, 1910, and maintain in force thereafter during a period of not less

than two years, a charge for the transportation of passengers from any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, to any point on defendants' lines in Omaha, Nebr., or from any point on defendants' lines in Omaha, Nebr., to any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, which shall not exceed 10 cents per passenger.

On February 7, 1910, the original bill was filed in the Circuit Court for the District of Nebraska. On March 13, 1910, the Interstate Commerce Commission filed its demurrer and answer. On April 25, 1910, the Circuit Court issued a temporary restraining order against the order of the Interstate Commerce Commission. On March 6, 1911, the cause was transferred to the Commerce Court. On April 3, 1911, the United States intervened. On May 26, 1911, the United States adopted the demurrer and answer of the Interstate Commerce Commission and the cause was argued and submitted.

On October 13, 1911, eight days after the opinion was filed, the Commerce Court entered its final decree, viz:

> This cause coming on to be heard on the 26th day of May, A. D. 1911, on bill filed February 7th, 1910, and on demurrer and answer of Interstate Commerce Commission filed the 3d day of March, A. D. 1910, and having been argued by counsel, Mr. John Lee Webster appearing for the peti-

> tioners, Mr. Blackburn Esterline for the United States, and Mr. Charles W. Needham for the Interstate Commerce Commission, and upon due consideration thereof, it is now, this 13th day of October, A. D. 1911, ordered, adjudged, and decreed that the said above referred to demurrer of the respondent be, and the same is hereby, sustained, and that the bill of complaint herein be, and the same is hereby, dismissed.

In opposition to the application for a supersedeas, the following points are submitted:

I.

It is settled beyond the reach of debate that the final decree dismissing the bill dissolved the preliminary injunction.

> 22 Cyc., 981; vol. 1, *Joyce on Injunctions*, secs. 330*b*, 330*c*; vol. 10, *Ency. of Pl. and Pr.*, 1029; *Hovey* v. *MacDonald* (109 U. S., 150, 158, 161); *Sweeny* v. *Handley* (126 Fed. Rep., 97, 99).

In *Hovey* v. *MacDonald, supra,* the court said (158):

> The terms of the injunction were that the defendants should be restrained from receiving the money until the final hearing of the cause. Of course, when the cause was finally heard and the bill dismissed the injunction ceased to have effect by its own terms. The appointment of Mr. Riggs as receiver was for the purpose of holding the money as agent of the court, and withhold-

ing it from the defendants until the decision. The words of his commission were "to collect and hold the money until and subject to the further order of the court." It was therefore a necessary consequence of the decree of dismissal that the injunction should be dissolved and that the receiver should be discharged and directed no longer to withhold the money from the possession of the defendants. The dissolution of the injunction and the discharge of the receiver were directions of course to be inserted in the decree of dismissal, unless the court should affirmatively order otherwise. The court below, it is true, in view of the appeal, might have made an order to continue the injunction and to retain the property in the receiver's hands; but that was a matter of discretion, to be exercised according to the justice of the case. If the judge did not see fit to exercise it, it was of course to add to the decree of dismissal its legal effect and consequence.

II.

It is likewise settled that when the preliminary injunction was thus dissolved it can not be revived except by a new exercise of judicial power, and the appeal from the final decree dismissing the bill does not affect the dissolution of the injunction.

Knox County v. *Harshman* (132 U. S., 14). *Leonard* v. *Ozark Land Co.* (115 U. S., 465). *Hovey* v. *MacDonald* (109 U. S., 150, 161).

In *Knox County* v. *Harshman, supra,* the court said (16):

> The general rule is well settled that an appeal from a decree granting, refusing, or dissolving an injunction, does not disturb its operative effect. (*Hovey* v. *McDonald,* 109 U. S., 150, 161; *Slaughterhouse Cases,* 10 Wall., 273, 297; *Leonard* v. *Ozark Land Co.,* 115 U. S., 465, 468.) When an injunction has been dissolved, it can not be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can of itself revive it. *A fortiori,* the mere prosecution of an appeal can not operate as an injunction where none has been granted.
>
> As stated by Mr. Chief Justice Waite, in *Spraul* v. *Louisiana* (123 U. S., 516, 518), "The supersedeas provided for in 1007 of the Revised Statutes stays process for the execution of the judgment or decree brought under review by the writ of error or appeal to which it belongs."

III.

Equity rule 93 provides:

> When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms, as to bond or otherwise, as he may consider

proper for the security of the rights of the opposite party.

When the Commerce Court ordered the bill dismissed it did not provide in the final decree that the preliminary injunction should remain in force and effect. Beyond question it intended that the order of the Interstate Commerce Commission should forthwith become effective. Had it not so intended, it would have provided otherwise under equity rule 19. In paragraph 7 of their application, the appellees expressly state that they, by their solicitor, personally applied to the presiding judge of the Commerce Court, and to Judge Mack, the writer of the opinion, "to know if the said court would not under the circumstances enter an order continuing the temporary injunction or suspending the operation of the order of the Interstate Commerce Commission pending the appeal, but which was not granted." The bill having been dismissed, and the preliminary injunction having been dissolved, and the Commerce Court having refused to continue the injunction in force, and the appeal to this court not affecting the dissolution of the injunction, this application falls squarely within the rule announced in *Staffords* v. *King* (90 Fed. Rep., 136). In that case the Circuit Court issued a preliminary injunction restraining certain persons from occupying and holding lands of which they were in possession, and the injunction was dissolved by the action of the court which granted it. The complainant appealed to the

Court of Appeals for the Fourth Circuit from the decree dissolving the injunction, and suspended its operation by giving a supersedeas bond. The Court of Appeals, speaking through Circuit Judge Simonton, said (140):

> The question we are called upon to decide is, did the supersedeas bond restore vitality to the injunction which the Circuit Court dissolved? A "supersedeas," properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or, if an execution has been issued, it prohibits further proceedings under it. (*Hovey* v. *McDonald,* 109 U. S., 159; 3 Sup. St., 136.) When an injunction has been dissolved, it can not be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can revive it. (*Knox Co.* v. *Harshman,* 132 U. S., at pp. 16, 17; 10 Sup. Ct., 8.) *And this language is broad enough to include an appeal with a supersedeas.* In *Hovey* v. *McDonald,* supra, the distinction is stated:
>
> The truth is that the case is not governed by the ordinary rules that relate to supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. * * * In this country the matter is usually regulated by statutes or rules of court, and generally an appeal, upon giving the security required by law (when security is required), suspends further proceedings, and operates as a

supersedeas of execution. * * * But the decree itself, without further proceedings, may have an intrinsic effect, which can only be suspended by an affirmative order, either by the court which makes the decree or by the appellate tribunal. This court, in the *Slaughter-House Cases* (10 Wall., 273), decided that an appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect. Mr. Justice Clifford, delivering the opinion of the court, says: "It is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court." It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, although all the requisites for a supersedeas were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered.

But this, it is added, is wholly discretionary; and the exercise of the power is not an appealable matter. This case is affirmed in *Knox Co.* v. *Harshman* (132 U. S., 16; 10 Sup. Ct., 8). Equity rule 93 was passed in accordance with this principle.

IV.

Section 2 of the act entitled "An act to create a Commerce Court," etc., approved June 18, 1910 (36 Stat., 542), provides:

> Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require.

The learned counsel for the appellees appears to appreciate the difficulty in this case, for the prayer of the application is that this court "grant an appropriate order" superseding the judgment and decree of the Commerce Court, and suspending, pending this appeal, the order of the Interstate Commerce Commission. This court is not asked, and could not well be asked, to issue its own injunction against the order of the Interstate Commerce Commission. The appeal, as shown, does not revive the preliminary injunction. If this court should modify the order of the Commerce Court and reinstate the injunction, the practical effect would be to prejudge the case in advance of a full hearing. It was held in *Leonard* v. *Ozark Land Company* (115 U. S., 465) that this court would not follow such a practice; it promulgated the present equity rule 93 in order that the full responsibility in such matters might rest upon the Circuit Courts.

The order of the Interstate Commerce Commission was to become effective February 1, 1910. It will expire in less than three months. According to the opinion and judgment of the Commerce Court the order of the commission was erroneously suspended for one year and nine months. If this court enters an appropriate order further suspending the order of the commission, the order will expire before any final judgment can possibly be entered by this court on the merits, and the appellees will have avoided complying with the same while it lasted. In other words, if this court should now suspend the order of the Interstate Commerce Commission and on a final hearing affirm the judgment, the labors of the commission and the Commerce Court and this court would have been spent in vain.

The giving of a bond would avail nothing. The Interstate Commerce Commission and the United States are the appellees. If the appellees are named as the obligees of the bond, such a bond would be ineffective as to the passengers traveling between Council Bluffs and Omaha. As the nickels pass into the possession of the company, it is at once beyond the power of the passengers ever to prove the payments and recover them back. The statement of the proposition answers it.

Counsel also urge that to require the appellants "to comply with the order pending this appeal would put said companies to great embarrassment, inconvenience, and expense, as well as irreparable

loss and injury, if it be finally held that the Interstate Commerce Commission was without jurisdiction to make the order." Again, he says there would be confusion of transfers, etc. These matters were all urged before and answered by both the Interstate Commerce Commission and the Commerce Court.

Appellants do not apply for any particular order on any particular authority, but they ask the Court, in its discretion, to grant " an appropriate order " and offer to give " such bond as this Court should order and direct in the premises," leaving it to this Court to work out the method to accomplish the result.

It is respectfully submitted that the application for such appropriate order should be denied.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
CHARLES W. NEEDHAM,
For the Interstate Commerce Commission.

APPENDIX.

UNITED STATES COMMERCE COURT.

No. 25.

OMAHA & COUNCIL BLUFFS Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company, petitioners, *v.* INTERSTATE COMMERCE COMMISSION, respondent. The United States, intervening respondent.	May session, 1911.

ON BILL AND DEMURRER.

For opinion and order of the Interstate Commerce Commission, see 17 I. C. C. Rep., 239.

For opinion of Circuit Court granting preliminary injunction, see 179 Fed., 243.

Mr. John Lee Webster, for petitioners.

Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.

Mr. Charles W. Needham, for Interstate Commerce Commission.

Before ARCHBALD, HUNT, CARLAND, and MACK, Judges.

[October 5, 1911.]

MACK, *Judge:*

The Omaha & Council Bluffs Railway & Bridge Co., hereinafter referred to as the bridge company,

an Iowa corporation, constructed, under authority of an act of Congress (act Mar. 3, 1887, 24, Stat., c. 356, p. 501), and now owns a joint railroad, wagon, and foot toll bridge over the Missouri River at Omaha, Nebr., and Council Bluffs, Iowa, and also owns a railway, which begins at the west end of the bridge in Omaha, Nebr., and extends eastward across the bridge to Council Bluffs, Iowa. The bridge company also owns the stock and bonds of the Omaha, Council Bluffs & Suburban Railway Co., a street railway line in Council Bluffs. The Omaha & Council Bluffs Street Railway Co., hereinafter referred to as the street railway company, owns and operates all of the street railway lines in Omaha, Nebr., in addition to which, in January, 1903, it leased all of the properties of the bridge company for a period of years, so that it now operates all of the lines of both systems.

Foot passengers pay 5 cents bridge toll; local street car fare in either city is 5 cents; interstate street railway passengers pay no direct bridge toll but a single fare of 10 cents, or $1.50 for 30 commutation tickets, for a ride to or from any point on the line in Council Bluffs, except Courtland Beach, over the bridge from or to any point on the line of the street railway company within the so-called loop in Omaha. Interstate passengers to or from a point in Omaha beyond the loop receive no transfers, but according to the practice sought to be corrected are required to pay an additional local fare of 5 cents. The loop district in Omaha extends westward on Douglas to Fourteenth Street, south upon that street to Howard, east to Eleventh, north to Douglas, and eastward back to the bridge.

On complaint the Interstate Commerce Commission refused to reduce the 10-cent fare to 5 cents, but abolished the loop limitation in Omaha, ordering the bridge and street railway companies not to charge more than 10 cents to or from any point on the line in Omaha from or to Council Bluffs, except Courtland Beach. The report of the commission will be found in 17 Interstate Commerce Commission Reports, 239. A bill was thereupon filed in the Circuit Court of the United States for the District of Nebraska, and a preliminary injunction was granted against the enforcement of this order. (*Omaha & C. B. St. Ry. Co.* v. *I. C. C.*, 179 Fed., 243.) The case was subsequently transferred to this court and is now up for disposition on a demurrer to the bill, except as to one paragraph, which is answered by adding to the order of the commission its report, thus making the latter a part of the record.

On the oral argument, though not in the briefs, it was suggested, in accordance with the charges of the bill, that the order of the commission in practically compelling the street railway company to give transfers in Omaha, went both beyond the issues in the case before the commission and beyond its constitutional as well as its statutory powers in that it thereby attempted to regulate the strictly intrastate affairs of the street railway company by an order which had no reference to the transportation over the bridge, but to what should happen after it was complete, compelling the company in effect to render an additional service without compensation. But the complaint before the commission was that the 10-cent fare between Council Bluffs, Iowa, and Omaha, Nebr., was un-

reasonable and unjust, and it was prayed that the defendants be required to make and fix passenger fares to apply in future to the transportation of passengers from Council Bluffs to Omaha, and the reverse, which should not exceed 5 cents per passenger or such charge as the commission should find reasonable and just. The report recited that the complainant assailed the 10-cent fare between the two cities over the bridge as unreasonable and prayed that " no extra charge be made when in the course of interstate transportation passengers are carried over such bridge," and the establishment of a 5-cent fare.

While the primary object aimed at was the reduction of the 10-cent fare to 5 cents, the prayer for the abolition of all extra charges and the fixing of a reasonable rate for interstate passenger transportation between the two cities fairly included, in our opinion, the elimination of the loop boundary for the 10-cent fare. Moreover, the commission expressly states in the report that " the reasonableness of confining it (the 10-cent fare) to points on the loop is put in issue in these proceedings."

The lines from the bridge in Omaha to and through the loop do not constitute a system separate and distinct from those beyond the loop. Both are under the common ownership, control, and operation of the street railway company. Local passengers pay a single fare within the city of Omaha between all points, receiving the necessary transfers at junction points to and from the loop.

The question presented was, therefore, not whether an independent company operating solely in Omaha beyond loop points and exchanging transfers solely for local passengers with an interstate

company operating the loop lines could be compelled to give transfers to interstate passengers as well—as to which we intimate no opinion—but whether or not the interstate company, operating all the lines as one system, the parts of which are independently operated only in a physical sense, in that transfers are necessary from and to the loop, could be compelled, without additional compensation, to carry an interstate passenger to a point on its own lines beyond the loop district; in other words, whether 15 cents is or is not a reasonable fare to be paid for the entire interstate journey made on the several lines operated by the street railway company. So stated, the question is obviously one of the reasonableness of interstate passenger rates, and as such clearly within the jurisdiction of the commission, if it has any jurisdiction over corporations such as the street railway company.

Complainants do, however, allege—and this brings us to a consideration of the principal and important question in the case—that the Interstate Commerce Commission, under the act, has no jurisdiction over interstate passenger rates charged by a corporation engaged in the business in which the street railway company is engaged here.

The judges of the Circuit Court before whom the case originally came, in granting a preliminary injunction, held that the complainants were street railway companies engaged in operating street cars for passenger transportation, and not commercial railroad companies engaged in the general transportation of freight and passengers, and as such did not come within the class of corporations

over whose rates the Interstate Commerce Commission has been granted jurisdiction. The cases cited in support of this view involved the interpretation of various State acts establishing commissions, regulating taxes, providing for joint rates or connections, giving mechanic's liens, abolishing the fellow-servant rule, or in other ways dealing with railroad problems. Under these statutes it was held that in as much as commercial railroads and street railways were classified separately by the legislatures, electric street railways would not be deemed to be embraced within the general term "railroad," as used in such acts. The principal of these cases, which cite the others, are *R. R. Commission* v. *Market Street R. R. Co.*, 132 Cal., 677 (65 Pac., 1065), and *Sams* v. *St. Louis, etc., Ry. Co.*, 174 Mo., 53 (73 S. W. Rep., 686). In each of these there was a vigorous dissenting opinion.

No court decision has been found directly involving an interpretation on this point of the Federal act to regulate commerce, although in the *Employers' Liability cases* (207 U. S., 463, at 497) Mr. Justice (now Chief Justice) White said: "From the first section it is certain that the act extends to every individual or corporation who may be engaged in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc."

The conclusion of the Interstate Commerce Commission that it has such jurisdiction is supported by its earlier decision in *Willson* v. *Rock Creek Ry.*

Co. (7 I. C. C. Rep., 83) and by its later decision in *Beall* v. *Washington, Alexandria & Mt. Vernon Ry. Co.* (20 I. C. C. Rep., 406). While two commissioners dissented as to the jurisdictional question in the *Rock Creek Ry. Co.* case in 1897, all concurred in the order which is sought to be enjoined in the present case, Prouty, C., speaking as well for Commissioners Knapp and Cockrell as for himself, making the following statement: "In *Willson* v. *Rock Creek Ry. Co.* (7 I. C. C. Rep., 83) I expressed the opinion that the act to regulate commerce did not apply to ordinary street railways. I still entertain the same opinion, but a majority of the commission thought otherwise in that case, and for the 12 years since we have uniformly adhered to that holding. It seems to me that this should be accepted as the settled law for this body until reversed by a majority of the commission or disapproved by a court of competent jurisdiction."

The fact that the opinion of the majority of the commission in the *Rock Creek Railway Co.* case has been acted on for so many years should compel us to hesitate before adopting an interpretation of the act contrary to that of the commission. On the other hand, the opinion of such experienced judges as granted the preliminary injunction in the present case and the doubts of our colleague, the presiding judge of this court, while chairman of the commission, and of his two associates, necessitate a careful examination of the question in the endeavor to ascertain whether or not, even though certain words literally construed may be held to grant the jurisdiction, a reasonable interpretation of the entire act, in the light of its history and of

the evils sought to be remedied and of the later amendments, supports the literal construction; in a word, whether sound interpretation of both the spirit and the letter of the statute sustains the jurisdiction of the commission.

There is no question that Congress could have granted jurisdiction over interstate street railway companies carrying only passengers. Neither is it controverted that, under the act, the commission has jurisdiction over some corporations engaged in interstate transportation of passengers alone, as well as over some corporations engaged in interstate transportation using electricity instead of steam as the motive power. But it is argued that, as the act itself shows, Congress never intended to exercise its power of regulation over all persons or corporations engaged in interstate transportation (having expressly excluded water carriers, for instance, except where operating in direct connection with a railroad under a common arrangement for continuous carriage); that the evils which compelled the intervention of Congress were due to the acts and omissions of the great railroad systems; that street railways in 1887 were ordinarily purely local and municipal, operated mostly by animal power and fully regulated by municipal ordinances; that many of the provisions of the act are entirely inapplicable to street railways; that commercial railroads, operated ordinarily by steam and vested with rights of eminent domain, are generally differentiated in legislation from street railways operated to-day ordinarily by electricity, generally not endowed with the right of eminent domain, and running usually upon city streets and public highways and not on private property; and that for these, as

well as for other reasons, electric interurban passenger street railways are not included within the classes of common carriers over which jurisdiction was granted by sec. 1 of the act. The relevant part of this section as it was in force when these proceedings were begun in the Circuit Court is copied.[1]

Intermediate between the ordinary urban street railways which, in the case of cities or towns near each other, whether in the same State or not, become State or interstate interurban surface railways carrying only passengers, and the commercial railroads carrying passengers and freight and

[1] SEC. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this act shall include express companies and sleeping-car companies. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.

operated usually by steam, are the so-called interurban electric roads. These have been organized, or at any rate have become important factors in transportation, since 1887. They usually carry mail, express matter, and some freight as well as passengers, and do not only a local business in more than one city and between cities, but also between city and country. It is conceded by counsel that corporations operating such roads, even though differing in many respects from so-called commercial railroads, come within the jurisdiction of the commission when engaged in interstate transportation. The commission so held in *C. & E. Elec. R. R. Co.* v. *I. C. R. R. et al.* (13 I. C. C. Rep., 20) and *C. & C. Traction Co.* v. *B. & O. S. W. R. R. Co.* (20 I. C. C. Rep., 486). In Nebraska and some other States corporations operating such interurban roads are, moreover, created under the general railroad acts.

The present street railway company differs from this class of interurban roads in that is is created under the street railway act of Nebraska; it does not and is not empowered to carry freight; and, moreover, unlike some interurban roads, it has no right of eminent domain. Like these, however, it carries mail; it serves not one but two cities and several towns, villages, and resorts; and though the bill of complaint alleges that the rails of the street railway company are all on streets and highways, it does not deny the statement in the report of the commission, referring probably to the leased lines of the bridge company, that the rails are not all laid in streets and highways, but for some distance run over private right of way and over the bridge across the Missouri River.

While, as complainant urges, the Nebraska corporation is the only party actually affected by the order, nevertheless the order is directed against it, not in relation to its business as a local Nebraska street railway corporation, but to its business as a carrier engaged in interstate transportation. As such carrier it is the successor of the Iowa corporation, the bridge company. Whatever may be the latter's charter limitations as an Iowa corporation, it erected the bridge and the lines thereon (both now leased to and operated by the street railway company) under power granted to it by Congress to construct, operate, and maintain the bridge and a " steam, electric, * * * or other line of railway."

Whether or not the street railway company is empowered as a Nebraska corporation to operate the bridge and the Iowa lines is immaterial in this case; it is, rightly or wrongly, engaged in their operation, and it is, therefore, a common carrier engaged in the interstate transportation of passengers by electric railway.

It is likewise immaterial to this inquiry that the street railway company is created under the street railway and not under the commercial railroad act of Nebraska. If, soundly interpreted, the Federal act gives the commission jurisdiction over such electric railways, State legislation is powerless to limit or to prevent such grant.

Does, then, the lack of statutory power to carry freight and to exercise the right of eminent domain so differentiate such a corporation as this street railway company from the modern interurban roads as to exempt it from the jurisdiction of the commission?

Great stress is laid upon a statement by Senator Cullom, chairman of the Senate committee, when the original act of 1887 was under consideration (Cong. Rec., vol. 17, pt. 4, p. 3472), that: "The bill is not intended to affect the stagecoach, the street railway, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects."

But whatever view may have been so expressed, it can not determine the correct interpretation of the act, particularly as it now stands, with all the changes that have been introduced since 1887.

If the language be broad enough to include such a corporation as the present street railway company, and there is no contention but that "railroad" may be and frequently is synonymous with or inclusive of "street railways," it is, moreover, immaterial that Congress may not specifically have intended to confer jurisdiction over the few comparatively insignificant interstate horse street railways of 25 years ago.

A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted—any more than the Constitution—in accordance with the economic or physical conditions prevailing at the time of its adoption. Then, too, the decision in *Wabash, St. Louis, etc., Railway Co.* v. *Illinois* (118 U. S., 557), definitely denying to the States the right to fix or regulate interstate rates for passengers, and thereby necessitating some congressional action, is as applicable

in its reasoning to interstate street railway rates as to those of commercial railroads. Unless the commission has jurisdiction over those rates they are absolutely uncontrolled.

As noted above, while Congress has expressly excluded water carriers, except when operated in direct connection with a railroad, it has not expressly excluded street railways. Moreover, the act has been several times amended since the *Rock Creek Railway Co.* case; and not only has Congress thus by its failure to exclude street railways apparently concurred in the construction there given, but by the latest amendment it has, in fact, given its apparent sanction thereto.

In 1910 section 15 of the act was amended to read: "The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character," which is the first specific mention of street electric passenger railways. This proviso, following the grant of power to establish through rates, etc., between railroad carriers, would have been totally unnecessary unless the commission had theretofore had jurisdiction over street electric passenger railways. Congress, therefore, must have enacted the legislation of 1910 upon the assumption that such jurisdiction had been conferred upon the commission by the original act.

The argument that many of the requirements of the act would be impossible of accomplishment by street railways does not impress us, inasmuch as this is at least equally true of sleeping-car companies, pipe lines, telegraph and telephone com-

panies, all of which are expressly covered by the statute. As to each of them only such of its provisions as are applicable will be deemed to refer to such companies, respectively.

The frequent repetition of the phrase "passengers *or* freight" clearly indicates that a carrier of passengers only is as subject to regulation by the commission as is a carrier of both freight and passengers.

Finding substantially nothing either in the language of the statute or in the history of this legislation that indicates an intent to exclude interstate passenger street railways from its operation, and finding, on the contrary, that the words of the act are broad and comprehensive enough to include them and that some at least of the evils sought to be remedied by this legislation can be corrected only if the commission have such jurisdiction, we are compelled to differ from the views expressed by the Circuit Court in granting the preliminary injunction, and to hold that power has been delegated to the commission to regulate rates of transportation by such companies as the complainants herein, which requires us to sustain the demurrer of the defendants and to dismiss the bill. And it is so ordered.

A true copy.

Test:

[SEAL.] G. F. SNYDER,

Clerk of the United States Commerce Court.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 458.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, AND OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, *APPELLANTS*,

VS.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES.

Appeal From the United States Commerce Court.

BRIEF FOR APPELLANTS.

John Lee Webster,
Solicitor for Appellants.

Frederic D. McKenney,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 846.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, AND OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, *APPELLANTS*,

VS.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES.

Appeal From the United States Commerce Court.

BRIEF FOR APPELLANTS.

THE STATEMENT OF THE CASE.

On or about the 8th of March, 1907, West End Improvement Club, an association of persons of Council Bluffs, Iowa, filed its petition with the Interstate Commerce Commission, complaining against Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company as defendants thereto, averring that a charge of ten cents (10c) for a single fare between Council Bluffs in the State of Iowa, and the City of Omaha in the State of Nebraska, is unreasonable and unjust, and praying that the complainants herein be ordered and required "to make and fix maximum passenger fares to apply in future to the transportation

of passengers from Council Bluffs to Omaha, and the reverse, which shall not exceed five cents (5c) per passenger, or such charge as the Commission shall find reasonable and just."

The said appellants herein as Street Railway Companies, filed answers before the Interstate Commerce Commission pleading that the said ten cent (10c) fare was not excessive, but to the contrary was just and reasonable. Said answers further averred that said street railway companies were not railroad companies within the meaning of the Interstate Commerce Act, and were not subject to the jurisdiction of the Interstate Commerce Commission.

Afterwards and on the 27th day of November, 1909, the Interstate Commerce Commission issued its order which reads as follows:

> "*It is ordered,* That the defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of February, 1910, from charging, demanding, collecting, or receiving their present fare of 15 cents per passenger for the transportation of passengers from Council Bluffs, Iowa, not including Courtland Beach, Iowa, to points on defendants' lines in Omaha, Nebr., or from points on defendants' lines in Omaha, Nebr., to Council Bluffs, Iowa, not including Courtland Beach, Iowa.
>
> *It is further ordered,* That the said defendants be and they are hereby, notified and required to establish on or before the 1st day of February, 1910, and maintain in force thereafter during a period of not less than two years, a charge for the transportation of passengers from any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, to any point on defendants' lines in Omaha, Neb., or from any point on defendants'

lines in Omaha, Neb., to any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, which shall not exceed 10 cents per passenger."

These appellants herein filed their bill in the United States Circuit Court for the District of Nebraska, praying for an injunction to enjoin the enforcement of the said order on two grounds:

First. That the Interstate Commerce Commission was without jurisdiction to make the order for the reason that the provisions of the Interstate Commerce Act applied to commercial railroads and not to street railroads, and that the word "railroad" in the Interstate Commerce Act does not include and was not intended to include street railway companies.

Second. That the effect of the order is to require Omaha & Council Bluffs Street Railway company (a Nebraska company which owns and operates the street railway lines in Omaha) to receive and carry without compensation to any point within the corporate limits of the City of Omaha, all persons who may have paid a 10-cent fare to ride from Council Bluffs, Iowa, to Omaha, Nebraska, on the line of Omaha & Council Bluffs Railway & Bridge Company. (The Iowa Corporation).

Omaha & Council Bluffs Railway & Bridge Company is incorporated under the laws of Iowa, as a Street Railway Company, and owns the street railway lines in Council Bluffs, Iowa, and extending over a bridge across the Missouri River to the eastern limits of the City of Omaha, Nebraska. Omaha & Council Bluffs Street Railway Company is incorporated under the laws of Nebraska as a Street Railway, and owns and operates the street railway lines in Omaha and adjacent munici-

palities, South Omaha, Dundee, Benson and Florence, and likewise operates the Council Bluffs lines of Omaha & Council Bluffs Railway & Bridge Company under a long time lease.

The case was first heard on bill and demurrer in United States Circuit Court for the District of Nebraska, before Judges Sanborn, Hook and Adams, who handed down a written opinion and granted a temporary injunction holding that the Interstate Commerce Commission had no jurisdiction to make the order. Said opinion and order is reported in 179 Fed. 243, and a copy of said opinion and order is printed herewith in the appendix. (See rec. p. 30).

Before final decree the case was transferred to the United States Commerce Court by operation of law, which heard the case on bill and demurrer, and held that the Interstate Commerce Commission did have jurisdiction to make the order and dismissed appellants' bill. (rec. pp. 36 to 44.) To the order and judgment of the United States Commerce Court the appellants filed their assignment of errors and sued out their appeal to this court.

ASSIGNMENT OF ERRORS.

I.

The court erred in holding that the Interstate Commerce Commission, under the Act to Regulate Commerce, has jurisdiction over Street Railroads and Street Railroad Companies; and whereas the court should have found that the Act to Regulate Commerce does not include Street Railroads and does not confer authority upon the Interstate Commerce Commission to regulate fares or transportation upon Street Railroads.

II.

The court erred in holding that the Interstate Commerce Commission had jurisdiction to make its order under date of November 27, 1909, fixing and regulating certain rates of fare upon the plaintiff's street railway lines, between points in the City of Council Bluffs, Iowa, and into and upon the lines of Omaha & Council Bluffs Street Railway Company within the corporate limits of the City of Omaha.

Whereas the court should have held that the order of the Interstate Commerce Commission was void and beyond the scope of its authority in that it requires the Omaha & Council Bluffs Street Railway Company to carry upon its lines within the City of Omaha without compensation, persons who may have paid a fare of ten cents (10c) to ride from Council Bluffs, Iowa, to Omaha, Nebraska, upon the lines of the Omaha & Council Bluffs Railway & Bridge Company.

III.

The court erred in refusing to grant the injunction prayed for by the plaintiffs, and by its order and decree directing that the plaintiff's bill of complaint be dismissed. (See rec. pp. 45-46.)

BRIEF OF THE ARGUMENT.

I.

THE ACT TO REGULATE COMMERCE AND THE ACTS AMENDATORY THEREOF AND SUPPLEMENTAL THERETO, AT THE TIME SAID ORDER WAS MADE, DID NOT INCLUDE STREET RAILWAY COMPANIES. THE TERM "RAILROAD" IN SAID ACT APPLIES ONLY TO COMMERCIAL RAILROADS AS DISTINCT FROM STREET RAILWAY COMPANIES.

The provisions of the act to regulate commerce apply to "any common carrier or carriers engaged in the transportation of passengers or property wholly by *railroad*, or partly by *railroad* and partly by water when both are used under a common control." The question is, whether the word *"railroad"* includes a street railway. Section 1 of the act defines "railroads" as follows:

> "The term *'railroad'* as used in this act, shall include all bridges and ferries used or operated in connection with any *railroad*, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards and grounds used or necessary in the transportation or delivery of any of said property."

The words, "common carrier" are defined in the first section of the act as follows:

> "That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by *railroad*, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning

and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by *railroad* (or partly by *railroad* and partly by water when both are used under a common control.")

Wherever else the words "common carrier" are used in the said act they are coupled with the phrase limiting them to the carriers "*subject to the provisions of this act.*" There is thus a manifest intention to limit the word "carrier" or "common carrier" to the kinds of carriers elsewhere *defined and made subject to the provisions of the said act.* We revert back all the while to the point whether the word "*railroad,*" as mentioned and defined in the act, includes or does not include a street railway.

To have the term "common carrier" applied to street railroads, or the word "railroad" as used in said act extended by implication to include street railways, would lead to many conflicting embarrassments in the construction of the act and to *impossible conditions* in the operation and enforcement of the act. This may be illustrated by reading one subdivision of Section 1 of the act as amended 1906 with the words "street railroad" substituted for the words "common carrier."

"Any common carrier (street railway) subject to the provisions of this act, upon application of any lateral, branch line of railroad, (street railway) or of any shipper tendering interstate traffic for transportation, shall construct, maintain and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad (street railway) or private side track which may be constructed to connect with its railroad (street railway), where such connection is reasonably practicable and can be put in with safety and will furnish sufficient

> business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper."

It will be seen from the quotation supra that if the words "common carrier" or "railroad" as used in the act includes street railway companies, that street railway companies may be *required to make connections with commercial railroads,* and that *shippers of stock* or merchandise would have the right to compel *street railway* companies to *transport stock* or merchandise upon the lines of track of a street railway company along and through the streets of the city to point of destination. Other like impossible conditions and incongruities will occur to the court in its consideration of said section.

Section 2 of the act applies to special rates, *rebates,* drawbacks, etc., or the granting of a rate less than it receives from any other person for transportation of a like kind of traffic under substantially similar circumstances, etc. Certainly such condition was not intended to apply to *street railway* companies, and can have no relation to the business as conducted by street railway companies.

To substitute "street railway" for "common carrier" in Section 6 is to make it manifest said section was not intended to include street railways. Section 6 of the act provides that every "common carrier" (street railway) shall afford "equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to *and* from their several lines. Said section had reference to commercial railroads only. (The words

"street railway" are inserted in following quotation for illustration):

> "That every common carrier (street railway) subject to the provisions of this act shall file with the commission created by this act, and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad (street railway), by pipe line, or by water when a through route and joint rate has been established. If no joint rate has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation."
>
> "The schedules printed as aforesaid by any such common carrier (street railway) shall plainly state the places between which property and passengers will be carried, and shall contain the *classification of freight in force,* and shall also state separately *all* terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges of facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee."

It is apparent from the quotation *supra* from Section 6 that the provisions thereof are *impossible* as applied to *street railway* companies. Section 7 applies to carriers subject to the act, yet it only deals with the handling of freight, which is not carried by street railways. We may add that an examination of each and singular of the sections of the said act to regulate com-

merce will disclose that they were enacted to apply to commercial railroads, and that most of the provisions are *impossible* if attempted to be applied to *street railways.*

Interurban Railroads. It is not necessary to our criticisms to suggest that there are interurban railroads operated by electric power which only carry passengers. The fact remains that such *interurban railroads* are usually constructed by corporations created under the *general railroad law of their respective states, and are possessed of the corporate power of commercial railroads, including the power of eminent domain and the right to transport freight.* Such interurban railroads are operated through the country as are commercial railroads, and are not limited to the right of constructing roads upon the streets of a city, coupled with a condition precedent of a majority vote of the electors as are the appellants.

We may say by way of illustration that interurban railroads in the State of Nebraska are incorporated under the general railroad laws of the state, and have power to transport freight and the right of eminent domain, and subject to all other conditions and limitations and possessed of all rights and privileges that belong or attach to commercial railroads, and are distinct from street railway corporations.

Senator Cullom, chairman of the Senate Committee, said when the act was under consideration:

> "*The bill is not intended to affect* the stage coach, *the street railway,* the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be en-

gaged in interstate commerce, as it would do if it was made to apply to all common carriers engaged in interstate commerce, *because it is not deemed necessary or practicable to cover such a multitude of subjects.*" Congressional Record, Vol. 17, Part IV, p. 3472.

Wilson v. Rock Creek Railway Co. of the District of Columbia, 7 I. C. C. R. 83, is a case where the Interstate Commerce Commission held that it had jurisdiction over the Rock Creek Railway Co., but the case is not decisive of the question in the case at bar. The Rock Creek Railway Company was *not* a street railroad in the sense that the complainant companies are street railroad corporations. The Rock Creek Railway Company was created by an act of Congress. Its operation was not confined to a street railway line upon the streets of a city. It was in the nature of an interurban railroad company. It would appear from the opinion of the Commission that it also had the corporate power to transport freight. Be that as it may, in said case Prouty, Commissioner, delivered a dissenting opinion which was concurred by Yeoman, Commissioner. Prouty in his dissent said:

"The term 'railroad' is undoubtedly broad enough to include a street railway, and often does include it in statutory enactments. There is, however, a *wide distinction* between a *railroad* in the ordinary acceptation of that term and a *street railroad*, and whether the term 'railroad,' when used in a particular statute, does or does not include a street railway, is a question of legislative intent in each particular case. Looking to the scope and substance of the Act to Regulate Commerce, *I do not think that Congress intended to include street railways.*"

In the opinion of the Commission in the instant case, *Prouty, Commissioner,* said, (Rec. p. 29):

> "In *Wilson v. Rock Creek Ry. Co.*, 7 I. C. C. Rep., 83, I expressed the opinion that the act to regulate commerce did not apply to ordinary street railways. I still entertain the same opinion." * * * "Knapp, Chairman, and Cockrell, Commissioner, instruct me to say that they also doubt upon the point of jurisdiction."

Said three Commissioners concurred in the order of the Commission by reason of the fact that the Rock Creek case had been acquiesced in for a period of 12 years.

SANBORN, HOOK AND ADAMS, United States Circuit Judges, were also of the opinion, as appears by their order, rec. pp. 30-31, that "*Congress never intended that the act to regulate commerce*" * * * "should apply to, and they are of the opinion that they do *not apply to, such street railway companies,* that no power has been delegated thereby to the Interstate Commerce Commission to regulate or affect the rates of transportation of such companies and that the order of the Interstate Commerce Commission was *beyond its powers.*"

II.

IT SEEMS TO BE WELL SETTLED BY ADJUDICATION THAT THE WORD "RAILROAD" AS USED IN THE CONSTITUTIONS AND STATUTES OF THE VARIOUS STATES DOES NOT INCLUDE STREET RAILWAY COMPANIES, AND THAT STREET RAILWAY CORPORATIONS ARE NOT GOVERNED BY LAWS RELATING TO RAILROADS. THIS DISTINCTION BETWEEN THE TWO KINDS OF RAILROADS WAS WELL KNOWN AT THE TIME OF THE PASSAGE OF THE ACT TO REGULATE COMMERCE.

The following list of cases in their various applications sustain the proposition that the word "*railroad*" as used in the constitutions and statutes of the several states does not include a street railway. Also that street railways are not included in fellow servant acts, in railway commission acts, in judgment lien acts, and other laws enacted to govern and control railroads, unless street railroads are specifically mentioned therein.

Cedar Rapids & Marion Street Ry. Co. v. City of Cedar Rapids, 106 Ia., 467.

Funk v. St. Paul Ry. Co., 61 Minn., 435.

Lincoln Traction Co. v. Webb, 73 Neb., 136.

Daily v. Milwaukee & E. R. L. Co., 119 Wis., 398.

Lincoln Street R. R. Co. v. McClellan, 54 Neb., 672.

Omaha Street R. Co. v. Boesen, 74 Neb., 765.

Railroad Company v. Railroad Commissioner, 73, Kan., 168.

State v. Cain, 69 Kan., 186.

Manhattan Trust Co. v. Sioux City Cable Ry. Co., 68 Fed., 82.

Bridge Co. et al. v. Iron Co., 59 Ohio St., 179.

Front Street Cable Ry. Co. v. Johnson, 2 Wash., 112.

Louisville & Portland Ry. Co. v. Louisville City Ry. Co., 2 Duvall (Ky.), 175.

In re New York District Ry. Co., 107 N. Y., 42.

Railroad Commissioners v. Market Street R. R. Co., 132 Cal., 677.

Thompson-Houston Etc. Co. v. Simon, 20 Ore., 60.

Sams v. St. Louis etc. Ry. Co., 174 Mo., 53.

State v. Duluth Gas & Water Co., 76 Minn., 96; (78 N. W., 1032-1034).

Gyger v. West Phila. Ry. Co., 136 Pa. St., 16.

Riley v. Galveston City R. R. Co., 35 S. W., 826.

State ex rel. vs. Lincoln Traction Co., Neb., Jan. 3, 1912. (See Appendix.)

Sears vs. Railway Co., 65 Iowa, 742.

Freiday vs. Sioux City Rapid Transit Co., 92 Iowa, 191.

Railroad Commissioners v. Market Street R. R. Co., 65 Pac., 1065 132 Cal., 677, is a case in which it was held that street railway companies were not included within the constitutional provision of the State of California providing for a railway commission. The constitutional provision, Sec. 22 of Art. 12, is quoted in the opinion of the court (p. 678) as follows:

> "The state shall be divided into three districts, as nearly equal in population as practicable, in each of which one railroad commissioner shall be elected. * * * Said Commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation

of passengers and freight by *railroad and other transportation companies.*"

The court in commenting upon the constitutional provision, among other things, said (p. 678):

> "Do the words, '*railroad and other transportation companies,*' include a street railway company in a municipality, engaged in the business of carrying passengers on street railroad cars? In order to correctly determine this question, we must look to the words used, the context, the object in view, and the evils that were intended to be remedied. In this manner we should, if possible, arrive at the intention of the convention in using the words, and give to them the same meaning and effect as was intended by the people, through their representatives, in framing the constitution. * * * The constitution in no place mentions street railroad corporations, although there were many such corporations in existence at the time it was framed."

The court in commenting upon the provisions of the constitution made some comments that are quite pertinent when applied to the act to regulate commerce, saying (p. 679):

> "In the section of the constitution quoted, the power is given to establish rates for *passengers and freight.* And it is further provided that the 'rates of fares and freight' established by the said commission shall be conclusively deemed just and reasonable. It is further provided, in Section 23 of the same article, that the state shall be divided into three 'railroad districts,' naming the counties in each district. This is consistent with the idea that the entire people of the state were interested in the great corporations engaged in the carrying of freight and passengers from one portion of the state to an-

other, or from sister states into or through the state. It is inconsistent with the idea that the entire people of the state were interested in the rates for carrying passengers within the corporate limits of a town or municipality."

Gyger v. West Philadelphia Ry. Co., 136 Pa. St., 96, is a case in which it was ruled that Sec. 4 of Art. 17 of the Constitution of Pennsylvania, which provides that

> *"no railroad, canal, or other corporation * * * shall consolidate * * * with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning * * * a parallel or competing line,"*

is not applicable to street railway companies.

In the opinion the Court said:

> "It is perfectly clear that the convention did not regard the word 'railroad' as synonymous with 'railway' or 'street passenger railway,' when this section of the article was framed."

Funk v. St. Paul Ry. Co., 61 Minn., 435 (52 Am. St. Rep., 608,) is a case in which it was ruled that the fellow servant act of the State of Minnesota did not apply to street railway companies. The statute reads (Gen. Statutes 1894, Sec. 2701):

> "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part, when sustained within this state."

The Court in its opinion said:

> "The common understanding of a *railroad* is that it is a graded road or way on which rails of iron

> or steel are laid for the wheels of cars to run upon, carrying heavy loads, usually propelled by steam."
>
> "A *street railway* is dedicated to a more limited use of the local public, for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is *not* a railroad. * * * A 'railroad' and a 'street railroad,' or way, are, in both their technical and popular import, *as distinct* and *different* things as a road and a street, or as a bridge and a railroad bridge; and it has been authoritatively adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase 'railroad bridge' means a viaduct constructed for the exclusive use of railroad transportation."

We called attention *supra,* to the point that if the complainant street railway companies were required to carry merchandise, or freight, or cars of railroad companies over their tracks in the streets of the cities, as they would be required to do if the act to regulate commerce was enforced against them according to its terms, that the same would be in *violation of the charters* of the companies. It was said in *Daly v. Milwaukee Electric Railway & Light Co.,* 119 Wis., 398:

> "To the extent that the defendant exceeded its authority by running freight cars over its tracks without legislative permission, express or implied, it must be regarded as acting in violation of law, and hence answerable accordingly."

The State of Kansas v. Grant Cain, 69 Kan., 186, is a case in which it was ruled that a statute of the State of Kansas, which made it a criminal offense to injure or destroy a locomotive, car, or other machinery in use

upon "any railroad" did not apply to or include a street railway. In the opinion the court said (p. 189):

> "The authorities generally hold that street railways are not included in the word 'railroads,' and the provisions of the statute of the different states concerning railroads have not been held to include street railways."

The court in its opinion to sustain the above cites and quotes from the following cases:

> *Funk v. Paul City Ry. Co.*, 61 Minn., 435.
>
> *Manhattan Trust Co. v. Sioux City Cable Ry. Co.*, 68 Fed., 82.
>
> *Louisville etc. R. R. Co. v. Louisville City Ry. Co.*, 63 Ky., 175.
>
> *Lincoln Street R. Co. v. McClellan*, 54 Neb., 672.
>
> *Bridge Co., et al., v. Iron Co.*, 59 Ohio St., 179.

Railroad Co. v. Railroad Commissioners, 73 Kan., 168, is a case in which it was ruled that the railroad commissioners of the state of Kansas did not have supervision over street railways. The section of the statute construed, reads as follows (p. 169):

> "Any *railroad* company authorized to operate a *railroad* in this state desiring to cross or unite its track with any other *railroad* upon the grounds of such other railway corporation shall make application in writing to the board of railroad commissioners, stating the place of crossing or intersection," etc.

The court in concluding its opinion said (p. 173):

> "We conclude that the railroad commissioners have no general jurisdiction over a company engaged in the operation of an electric railway; that such a company is not included within the term 'rail-

> road company' as ordinarily employed in the statute referred to; and that the language of the section relating to the crossing of railroad tracks does not manifest an intention to give that part of the law any wider application in this respect."

Sams vs. St. Louis, etc. Ry. Co., 174 Mo., 53, in a case in which it was ruled that the fellow servant act of 1897 did not apply to street railway companies. The language of the first section of the fellow servant act of 1897 of the State of Missouri reads as follows (p. 64):

> "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof."

The question presented in the case was, whether the word "railroad" as used in said section included a street railway. The court in its opinion said (p. 69):

> "It is conceded that the term 'railroad' when used in a statute does not always include in its meaning a street railroad. The learned counsel for appellant in their brief say: 'For some purpose the law recognizes several species of railroads and railroad companies, and recognizes a distinction between a 'railroad' and a 'street railroad.' Statutes using the general term 'railroad' may or may not apply to a 'street railroad.' That is undoubtedly the law, and, therefore, when the word 'railroad' is used in a statute, if we want to know if it is intended to embrace in its meaning a street railroad, we must look at the connection in which it is used.'"

The court then cites with approval the rulings of the courts of other states in the following cases, holding that "railroad" does not include street railway: *Funk v.*

St. Paul City Ry. Co., 61 Minn., 435; *Williams v. City Electric St. Ry. Co.*, 41 Fed., 556; *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 68 Fed., 82; *Thompson-Houston, etc., Co. v. Simon*, 20 Ore., 60.

The Court in speaking of the cases said (p. 75):

> "The general doctrine runs through them all that the term *'railroad' does not include 'street railroad'* unless so expressed or necessarily understood from the context; that as a rule, the term means ordinary commercial railroads only, and it is the exception when it means street railroads."

Louisville etc. Ry. Co. v. Louisville City Ry. Co., 63 Ky., 175, is a case in which the court said:

> "A rail*road* is for the use of the universal public in the transportation of all persons, baggage and other freight,—a street rail*way* is dedicated to the more limited use of the local public for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street rail*way* is not a rail*road*. And we presume that in this contradistinctive sense, the term 'rail*road*' was used in the appellant's charter as amended in 1860. A *'railroad'* and a *'street* railroad' or way, are, in both their technical and popular import, as distinct and different things as *'a road'* and a *'a street,'* or as *'a bridge'* and *'a railroad* bridge,' and it has been authoritatively adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase, a *'railroad* bridge' means a viaduct constructed for the exclusive use of railroad transportation."

Front Street Cable Ry. Co. v. Johnson, 2 Wash., 112, is a case that involved the question whether a street railroad was included within the word "railroad," in

the lien law of the State of Washington. The court held that a *"street railroad" was not a "railroad"* within the meaning of said act, and among other things said:

> "We deem it to be a clear proposition, also that these 'railways' are not 'railroads;' according to the usual and ordinary meaning of the word, to which reference must be had for the interpretation of a statute."

Thompson-Houston Co. v. Simon, 20 Ore., 60, is a case which involved the question whether the words "any railway" in the statute relating to *eminent domain* conferred that power upon a street railway company, and the court held it did not. The court said:

> "It is plain that the provisions of such a law can have little or no reference to corporations organized and operated as street railways propelled by electricity or horse power and intended to accommodate local convenience for the transportation of passengers. They contemplate a track laid upon an established street or highway, and are usually restricted to the bounds of the city, its vicinity, or adjacent towns, and generally derive their authority to lay their tracks upon such streets or highways from the municipality or county, and their construction is regarded by many adjudications as a legitimate use of such streets and highways, and an exercise of the right of public travel."

Riley v. Galveston City R. R. Co., 35 S. W., 826, is a case in which it was ruled that a fellow servants act which used the phrase "any railway corporation" did not include street railway companies. The court in its opinion said (pp. 826-7):

> "These considerations are persuasive, if not conclusive, that the intention of the legislature in passing the fellow servants act was not to in-

clude street railways within its provisions, and that the words 'any railway corporation' in the first section of the act, *should be restricted* to the usual and popular import of that term, and that the act should be held not to embrace railways constructed and maintained upon streets and other highways in and contiguous to cities and towns for carrying persons. The supreme court of Kentucky, in the case of *Louisville & P. R. Co. v. Louisville City Ry. Co.*, held that a 'railroad' or 'railway,' and a 'street railroad' or 'street railway,' are, in both their technical and popular import, as distinct and different things as a 'road' and a 'street,' or as a 'bridge' and a 'railroad bridge.'" * * * "A further distinction between a 'railway corporation' or 'railroad corporation' and a 'street railway corporation' is this: That the former owns, not only its track and roadbed, but its right to their use and occupation is exclusive, while the latter owns no roadbed, nor is its occupancy of that portion of the street on which its track is laid exclusive, but it is only a license of the city, with privilege to use the street in common with the public. Our conclusion, therefore, is that the act known as the 'Fellow Servants Act,' and entitled 'An Act to define who are fellow servants, and who are not fellow servants,' etc., and approved May 4, 1893, does not apply to street railways."

Manhattan Trust Co. v. Sioux City Cable Ry. Co., 68 Fed., 82, is a case in which *Judge Shires* held that the *Iowa Statute* making a judgment against any railway corporation, for injury to person or property, a lien superior to that of mortgages on its property, *does not apply to street railway* corporations. The court in the course of its opinion said (p. 84):

"It cannot be denied that there is, in fact, a *distinction* between the two kinds of railways, and an examination of the statutes of the state shows

that such a distinction is recognized in the legislation of the state, and that in general the term 'railroad or railway' is used to designate the former class, and the words 'street railway or railroad' the latter. From this it follows that, unless the context or subject-matter of a particular statute shows the contrary, the *presumption* is that the legislature did not intend to include street railways in the general term 'railroad or railway.' "

State v. Duluth Water Co., 76 Minn., 96, is a case in which it was held that the *gross-earnings tax law* of Minnesota did not apply to *street railways* on the theory that a street railroad company is not a railroad company. The court in its opinion said (p. 106):

"Assuming, without deciding, the validity of this act, it applies only to what are usually known as ordinary commercial railways, *and not to street railways.* This is the practical construction which has always been placed on this statute by both the state and the street-railway companies. The correctness of this construction was assumed without question by this court in *State v. District Court of 11th Jud. Dist.*, 54 Minn., 34; 55 N. W., 816. All through our statutes the legislature has uniformly, so far as we have discovered, used the word 'railroad' or 'railway,' when unqualified, as referring exclusively to ordinary commercial railroads, while, on the other hand, when they have intended to refer to street railroads they have qualified the word 'railroad' by the prefix 'street.' " * * *

"While the defendant may possess some unexercised powers not ordinarily conferred upon street-railway companies, yet it is perfectly apparent that it is in all essential respects a 'street,' and not a 'commercial,' railroad. Therefore the gross-earnings tax law of 1887 does not apply."

Lincoln Street Ry. Co. v. McClellan, 54 Neb., 673,

is a case in which it was held that Sec. 3, Art. 1, Ch. 72, which provides *"every railroad company"* shall be liable for damages inflicted upon passengers except in cases where the injury arises from the criminal negligence of the person injured, *does not apply to street railway companies.* The court among other things said (pp. 675-676):

> "There is nothing whatever in the title or body of the act which indicates a legislative intent to make its provisions, or any of them, applicable to street railways." * * * "In the common understanding, *a railroad* and a *street railway have always been separate and distinct things.* One is a graded road over which heavy cars, running on iron or steel tracks and usually propelled by steam, carry passengers, *freight,* and *baggage,* while the other is *exclusively employed for the transportation of passengers in cities* and is so constructed as to interfere but little with *ordinary traffic.*"

In *Omaha Street Railway Co. v. Boesen,* 74 Neb., 764, the same point was ruled where the court said (p. 766):

> "Section 3, Article 1, Chapter 72, Compiled Statutes 1903 (Ann. St. 10039), which charges railroad companies with liability for all damages inflicted upon the person of their passengers while being transported over their roads, except when the injury arises from the criminal negligence of the person injured, has no application to street railways. *Lincoln Street R. Co. v. McClellan,* 54 Neb., 672."

In *Lincoln Traction Co. v. Webb,* 73 Neb., 136, it was again said that street railway companies are not governed by Ch. 72 of Comp. Statutes "which defines the liability of steam railways in this state for damages inflicted upon passengers."

Massachusetts Loan & Trust Co. v. Hamilton, 88 Fed. 588, is a case where the Circuit Court of Appeals for the Ninth Circuit held that a statute of Montana which provided that a "judgment against *any railway corporation* * * * shall be a lien, etc." Said court held that the words "any railway corporation" as used in the statute did not apply to and did not include street railways. The court after an analysis of a large number of cases concludes, p. 598:

> "Having arrived at the conclusion that the statute in question is not applicable to street railroads, and this being conclusive of the case, it is unnecessary to notice any of the other objections presented by appellant. The decree of the Circuit Court is reversed and the cause remanded, with instructions to dismiss the bill."

III.

UNDER THE CONSTITUTION AND LAWS OF NEBRASKA, OMAHA AND COUNCIL BLUFFS STREET RAILWAY IS A STREET RAILWAY AND IS NOT A STREET RAILROAD.

A copy of the sections of the Constitution and Statute Laws of Nebraska, relating to railroads and to street railways, are printed in an appendix to this brief.

Sections 3 and 4 of Article 11 of the Constitution of 1875 apply to *railroads* engaged in the *"transportation of passengers and freight."*

Section 2 of Article 11-b. of the Constitution prohibits the construction of a street railway within a city without the consent of a majority of the electors.

Railroads are incorporated under Sections 72, 73, 74, 75 of Chapter 16, under the sub-head "**railroad companies**," of Compiled Statutes of Nebraska, 1911, pp. 596,

597. Street railway companies are incorporated under the sub-division relating to miscellaneous corporations. See Section 1, Article 7, Chapter 22, Compiled Statutes of Nebraska, 1911, p. 1475. By Section 3 of Article 7, street railway corporations are required to "name the streets through which said railway is to be constructed." And the proposition to be submitted to the electors of said city shall "name the streets through which said railway is to be constructed." Section 12 of Article 7 defines a street railway as embracing "all street railroads built and operated for the convenience of passengers along the streets of cities."

By Section 3 of Article 11 of the Constitution *railroad* corporations are prohibited from consolidating their stock, property or franchises. By Section 6 of Article 7, Chapter 72, Compiled Statutes 1911, p. 1477, street railways having connecting or continuous lines are "authorized to consolidate." Railroads possess the power of eminent domain. Street railways do not. Certificate of incorporation of a railroad is filed with the *Secretary of State*. Articles of incorporation of a street railroad are filed with the *County Clerk* of the county in which incorporated.

It will thus be seen there is a well defined and marked *distinction* between *railroad* corporations and *street railway* corporations under the constitution and laws of the State of Nebraska.

This distinction was recognized in *Lincoln Street Railway v. McClellan*, 54 Neb., 672, which held that Section 3 of Article 1, Chapter 12, relating to railroad companies, did not apply to street railway companies. And likewise, again in *Omaha Street Railway Company v.*

Boesen, 74 Neb., 764, and in *Lincoln Traction Co. v. Webb,* 73 Neb., 136, cited and quoted from *supra.*

In a late case, *State ex rel Tyrrell v. Lincoln Traction Co.,* opinion filed January 3, 1912, and not yet published, the court held that Sections 3 and 5 of Article 11 of the Constitution applied to *railroads,* but did not apply to *street railroads.* The syllabus of the opinion prepared by the court upon this point is as follows:

> "2. Section 3, Article XI of the Constitution, which prohibits the consolidation of the stock, property, franchises or earnings in whole or in part of railroad corporations and telegraph companies owning parallel or competing lines, does not apply to street railway corporations not engaged in general railroad or telegraph business."
>
> "3. Section 5, Article XI of the Constitution, which forbids a railroad corporation issuing any stocks or bonds except for money, labor or property actually received and applied to the purposes for which such corporation was created, does not apply to street railway corporations not engaged in general railroad business."

The above case arose out of a consolidation of the stock and franchises of the Lincoln Traction Co., and the Citizen Street Railway Co., both being street railways in the City of Lincoln. The suit was one by the state to set aside the consolidation and for a cancellation of the stock and bonds of the consolidated company. The court in its opinion held that the provision of the State Constitution which prohibited the consolidation of railroads did not apply to or include street railroads. For full text of the opinion on this point see appendix to this brief.

The conclusion is self evident that Omaha & Council Bluffs Street Railway Company, a Nebraska Corpo-

ration under the Constitution and Laws of Nebraska, is a street railway, as distinct from a railroad company, and that the two classes of corporations are governed by different constitutional provisions and by different statutes, and that their corporate powers are distinct.

IV.

OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY IS INCORPORATED AS A STREET RAILWAY COMPANY UNDER THE LAWS OF THE STATE OF IOWA, AND THE LAWS OF WHICH STATE ALSO RECOGNIZE THE WELL DEFINED DISTINCTION BETWEEN STREET RAILWAYS AND RAILROADS.

Sears vs. Railway Company, 65 Iowa, 742, is a case in which it was held that the two classes of corporations were distinct and that a statute requiring railroads to pay damages to abutting lot and land owners did not apply to street railroads, and said, p. 744:

> "In the grant of power, both 'railways' and 'street railways' are mentioned. There is, then, a statutory implication that they are not the same, but that there is a material difference between the two; and that a grant of the power to authorize one would not necessarily include the other. The limitation or qualification of such power, it will be observed, is thus expressed in the statute: 'But no railway track can thus be located and laid down' until the damages to the abutting owners is ascertained and compensated. As thus used in the statute, does 'railway track' mean or include 'street railway track,' operated by horse-power? We think not."

In *Freiday vs. The Sioux City Rapid Transit Co.*, 9 Iowa, 191, it was ruled that "an elevated steam rail-

road, although operated within the limits of a city was not a street railway." The court in its opinion noted the distinction between *an elevated* railroad operated by *steam* and a street surface railroad, and on this point said, p. 195:

> "Indeed, under the circumstances, it must be presumed that the words 'street railway,' as used in the statute, originally referred to the then known and used railways, the rails of which were laid to conform to the grade of the surface of the street, and the construction of which did not of necessity exclude the public from the use of a part of the street. While, as we have indicated, the object attained by an elevated railway like defendant's is the same as in case of a street railway laid upon the surface of the street, viz., the transportation of people from one place to another within the municipality, in every other respect, the elevated road is distinguishable from a surface railway. The defendant company's road is elevated above the street."

Cedar Rapids & Marion City R. Co. vs. City of Cedar Rapids, 106 Iowa, 476, is a case in which it was ruled that a company incorporated as a *street railway* to operate a line in the City of Cedar Rapids was a *street railway* notwithstanding the fact that it operated its line along a *highway to a neighboring town* by "over-head trolley." In the course of the opinion the court said, pp. 480-481:

> "The fact that plaintiff's street railway was authorized to be extended and laid and operated along a highway, precludes the conclusion that it was intended to be other than a street railway. Street railways constructed and operated as they are in streets and highways do not exclude other travel therefrom; but not so as to other railways constructed and

operated along a street or highway. Plaintiff's railway is identical in its construction and operation with other street railways, except in that it carries freight and express, to a limited extent, as well as passengers, while most others carry passengers only. It is unlike other than street railways in almost every other particular. It is insisted that this alone distinguishes it from street railways, and authorities are cited wherein it is said that a 'distinctive and essential feature of a street railway in relation to other railroads is that it is exclusive for the transportation of passengers, and not for goods.' Ordinarily that is true, but in this case we have a street railway corporation organized to operate a street railway in the City of Cedar Rapids, extending its railway beyond the limits of said city, under authority of said chapter 32, Acts Eighteen General Assembly, expressly relating to street railway companies. *Surely the mere fact that plaintiff carries goods and express matter does not take it out of the class of railways where this statute puts it.* It is not a 'railway corporation,' as contemplated in said section 1317, but a street railway, and is therefore subject to assessment by the local assessors."

In *Manhattan Trust Co. vs. Sioux City Cable Ry. Co.*, 68 Fed. 82, *Judge Shiras,* held, that the mechanic's lien law of the State of Iowa, which applied to *railroad companies* did not apply to *street railway* companies. (See excerpts from the opinion *supra.)*

We thus see that Omaha & Council Bluffs Railway & Bridge Company, which was incorporated as a street railroad under the laws of Iowa, and owns the street railway lines in the City of Council Bluffs, is a street railway as distinct from a railroad under the Constitution and Laws of the State of Iowa.

V.

THE DUAL FUNCTIONS OF A COMMERCIAL RAILROAD AND A STREET RAILWAY CANNOT BE COMBINED IN THE SAME CORPORATION.

Gillette vs. Aurora Ry. Co., 228 Ill., 261, is a case where the railway company was organized under the general railroad act of the State of Illinois as a commercial railroad. Its general purpose was to carry passengers, baggage and express. The court in that case said:

> "It is quite clear that the legislature never intended that a commercial railroad corporation should be formed for the mere purpose of constructing and operating street railways."
>
> "In *Chicago & Southern Traction Co. vs. Flaherty*, 222 Ill., 67, it was considered scarcely a doubtful question whether the same corporation could be both a street railway corporation and a commercial railroad corporation, *and we think it perfectly clear that it cannot.*"

Bradley Mfg. Co. vs. Traction Co., 229 Ill., 170, is a case in which it was said (pp. 175-6):

> " 'That any number of persons, not less than five, may become an incorporated company for the purpose of constructing and operating any railroad in the state.' (Hurd's Stat. 1905, p. 1564.) While the language above quoted is broad, it has been held (*Chicago & Southern Traction Co. vs. Flaherty*, 222 Ill., 67, and *Gillette vs. Aurora Railways Co.*, 228 id., 261), *that the same corporation cannot be both a street railway corporation and a commercial railroad corporation.*"

The presumption is that "railroad" does not include "street railway." There are no words in the Act to Regulate Commerce which either specifically or by implication include street railroads. To the contrary

there are many provisions of the Act to Regulate Commerce which are impracticable and impossible if attempted to be applied to street railroads.

VI.

THE ACT TO REGULATE COMMERCE HAS BEEN UNDER DISCUSSION, AND VARIOUS AMENDMENTS HAVE BEEN MADE THERETO SINCE ITS FIRST ENACTMENT IN 1887. IF CONGRESS INTENDED TO EXTEND SAID ACT TO INCLUDE STREET RAILWAYS WHY HAS NOT SUCH AMENDMENT BEEN MADE WHEN OTHER AMENDMENTS WERE BEING MADE TO THE ACT?

From the cases cited *supra,* it is manifest that the members of Congress (many of whom are lawyers) were familiar with the settled rule of construction by which the word "railroad" as found in the constitution and statutes of the states did not include a "street railway." They were further advised that there did not exist any general public demand that street railways should become subject to congressional legislation, or the control of an Interstate Commerce Commission.

The said act to regulate commerce has been amended so as to include certain specified companies other than commercial railroads, to-wit: "express companies," "sleeping car companies," "pipe lines," etc. We are not aware that it was proposed by anybody to insert into the law the words "street railways," or "street railway companies."

In deciding whether the act to regulate commerce applies to street railways it is proper to consider the inconveniences that would result to the public by compelling interchange of freight and cars and passengers between commercial railroads and street railway com-

panies, as well as the fact stated supra that there exists no necessity, nor public demand for the regulation of street railway companies by the Interstate Commerce Commission.

This subject matter is well illustrated in the following cases:

Michigan Ry. Co., et al. vs. Hammond, etc., Electric Ry. Co., 83 N. E., 650, is a case in which it is ruled that a statute of Indiana, which reads as follows, does not apply to street railways:

> "Sec. 4. 'In case, however, one railroad company or an electric railroad company shall hereafter cross at grade with its track or tracks, the track or tracks of another railroad, the railroad company or the electric railroad company seeking to cross at grade shall be compelled to interlock such crossing to the satisfaction of the said Auditor, and to pay all cost of such appliance, together with the expense of putting them in and the future maintenance and operation thereof,' " etc.

The court in giving its reasons why the above quoted statute does not apply to street railway companies among other things said (p. 653):

> "We know as a matter of public history that at the time of the passage of the act of 1897 this right of crossing on highways had been exercised in a great many cities in the state where electric street railways and steam railroads were both maintained. We also know that interlocking systems consist in part of appliances that occupy space and would be obstructions, if constructed in the streets and highways, that would seriously interfere with the rights of the public therein. * * * It had for its primary object the relief of the intersecting railroads from a burden which the safety of the public made neces-

> sary, a relief that could only be obtained by substituting a protection that was considered equally as good. This is evident from the first three sections of the act. Under it intersecting railroads already constructed had the choice of alternatives, they could either continue to stop their trains, as required by law, or they could put in the protecting devices, as stipulated, the ultimate purpose in either event being the protection of the traveling public. *We cannot attribute to the Legislature* the intention to compel the erection of obstructions, such as interlocking systems, in the public streets and highways by street railroads, which, in theory at least, are not obstructions to the free use thereof, for the primary benefit of the railroads crossing the same, it being the policy of the law to keep the public thoroughfares as free from obstructions as the growing demands of the public will permit."

Massillon Bridge Co. vs. Cambria Iron Co., 59 Ohio St., 179 (52 N. E., 192) is a case in which it was held that a mechanics' lien law did not apply to street railway companies. The section of the statute under consideration contained the following language:

> "'A person who performs labor or furnishes material for or in construction of any *railroad*, depot buildings, water-tanks, or any part thereof, and a person who furnishes boarding on the order of any contractor or sub-contractor, to persons employed by them or either of them, in furnishing materials, or performing labor for or in construction of such railroad,'" etc.

The court in ruling that the word *railroad* as used in said mechanics' lien law quoted *supra* did not apply to a street railroad, used the following language par-

ticularly pertinent to the construction to be put upon the Act to Regulate Commerce. The court said:

> "The statute speaks of *railroads, depot buildings, water tanks, and railroad companies,* all of which are peculiarly applicable to steam railroads; and it is *silent as to street railroads, barns, power houses, poles, wires, dynamos, machinery, and car barns,* and in fact silent as to everything that is peculiarly applicable to street railroads. If street railroads were intended to be included, the statute, in some of its enactments, *revisions,* and *amendments,* would have used some word peculiarly applicable to street railroads." * * * "From a careful examination of the course of legislation on the subject of railroads and street railroads, it appears that the legislation as to each has been carefully kept separate, and the statutes as to railroads do not apply to street railroads unless made to do so by clear reference."

The two cases quoted from *supra* are important in the consideration of two points in discussion: (1) the impracticability in the application of the Act to Regulate Commerce to street railway companies; (2) the fact that while numerous amendments have been made to the Act to Regulate Commerce, no words have been used to indicate that *street railroads* are to be included, nor words or phrases that would have any special application to street railroads.

VII.

THE ORDER OF THE COMMISSION IS VOID BECAUSE IT WAS BEYOND THE SCOPE OF THE COMPLAINT, AND FOR THE FURTHER REASON THAT THE EFFECT OF THE ORDER IS TO REQUIRE OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY TO RECEIVE AND CARRY IN ITS CARS TO ALL POINTS WITHIN THE CITY OF OMAHA, AND WITHOUT COMPENSATION, PERSONS WHO HAVE PAID A FARE OF TEN CENTS TO RIDE ON THE BRIDGE LINE FROM COUNCIL BLUFFS, IOWA, TO THE EASTERN BOUNDARY OF THE CITY OF OMAHA, AND IS THEREFORE A DIRECT INTERFERENCE WITH WHAT IS INTRASTATE BUSINESS.

The complaint of the West End Improvement Company before the Interstate Commerce Commission complained only of the ten cent fare charged for a ride upon the lines of the Omaha & Council Bluffs Railway & Bridge Company from Council Bluffs, Iowa, to the eastern limits of the City of Omaha, and the prayer was that the railway companies be required "to make and fix maximum passenger fares to apply in future to the transportation of passengers *from Council Bluffs to Omaha,* and *the reverse,* which shall not exceed five cents (5c) per passenger, or such charge as the Commission shall find reasonable and just." See record, p. 2, folio 3.

The order made by the Commission *did not* reduce the ten cent fare from Council Bluffs, Iowa, to Omaha, Nebraska, but to the contrary left the 10 cent fare in force to passengers who traveled between the two cities.

The order as made requires the Omaha company to fix "*a charge for the transportation of passengers from any point on defendant's lines in Council Bluffs, Iowa, to any point on defendant's lines in Omaha, Nebraska,*

or from any point on defendant's lines in Omaha, Nebraska, to any point on defendant's lines in Council Bluffs, Iowa," not exceeding ten cents per passenger. See record top page 5.

The effect of said order is that when a passenger shall have paid 10 cents from Council Bluffs, Iowa, to Omaha, Nebraska, on the bridge line, he may get on board a car of the Omaha company and ride to any point within the city limits of Omaha *without paying any additional fare.*

The cars of Omaha & Council Bluffs Railway & Bridge Company pass on its lines from Council Bluffs to Omaha, thence around a loop in Omaha and return to Council Bluffs. Such was the manner of operation before the bridge company leased its lines to the Omaha company, and the same method of operation is still continued.

The cars of Omaha & Council Bluffs Street Railway Company (the Omaha company) are operated independently, so that a passenger upon the cars of either company, who may desire to take the cars of the other company, must leave the car of the one line, and take the car of the other line at some street intersection. There is no continuous operation of the cars of the one line upon and over the tracks of the other line. Neither is there any connecting depot for connections or transfers.

When a passenger gets aboard a car of the Bridge company at Council Bluffs and reaches Omaha he has completed his travel on that line. If he desires to go to any other point in Omaha he leaves that line and takes a car on the Omaha line at any convenient point at which he may find it, just as any passenger in Omaha may get

aboard a car of the Omaha line. When he gets aboard a car of the Omaha line, there is nothing to indicate that he may have come from Council Bluffs, or that he may have been a passenger on the Bridge line. Neither is there any way to know that he has paid a 10 cent fare from Council Bluffs to Omaha. If he got aboard a bridge car at a point between Council Bluffs and Omaha he would have paid a 5 cent fare, not a 10 cent fare. Hence such passenger would not be entitled under the order of the Commission to a transfer on the Omaha lines.

Again, how is anybody to know when the passenger gets aboard a car at Council Bluffs and pays to the conductor a 10 cent fare, that he intends to ride beyond the loop of the Bridge line? How is a conductor on the Omaha line to know that *one* man of the thousands of people who ride on the *Omaha* cars intends, when he leaves that car to get aboard a Bridge line car and go to Council Bluffs? It isn't like the case of a traveler on a commercial railroad who buys a ticket from one termini to another in different states. The Street railway charges a flat fare of 5 cents to all points within the City of Omaha. It is likewise a flat fare of 5 cents to all points within the City of Council Bluffs. When a passenger is carried across the bridge over the Missouri river, an additional charge of 5 cents is made on the Bridge line (which is the same fare charged to a foot passenger going over said bridge). The result is that the 10 cent fare from Council Bluffs to Omaha is but a 5 cent fare from point to point within the limits of Council Bluffs, plus the *bridge toll rate* for crossing the bridge, 5 cents. When he reaches Omaha his journey is completed so far as the Bridge line goes.

Under the circumstances what power is vested in the Commission to make an order requiring the *Omaha company* to permit a passenger who has paid the 10 cent fare from Council Bluffs to Omaha on the Bridge line, to get upon the cars of the Omaha company and travel to any point within the corporate limits of that city without paying *any additional compensation,* when he has become purely an intrastate passenger so far as the Omaha company is concerned? The single fact that the Omaha company operates the lines of the Bridge company under a lease does not change the *actual situation.* The manner of operation has not been changed. The two companies are still operated as independent companies, just as much so as they were before the lease was made.

Again, the order as made by the Commission does *not affect travel* on the line of the *bridge company.* It does not affect the fare paid for riding over the bridge nor the fare paid from Omaha to Council Bluffs, or the reverse. *Its only effect is that when a man has ridden from Council Bluffs to Omaha and paid a 10 cent fare, that he may get on an Omaha car and ride ten or twenty miles farther without paying to that company any compensation at all. The query is what authority had the Commission to make this order?*

Our claim is that the order of the Commission is beyond the scope of the relief prayed, and is one that the Commission did not have jurisdiction to make.

JOHN LEE WEBSTER,
Solicitor for Appellants.

FREDERIC D. MCKENNEY,
Of Counsel.

APPENDIX.

"OMAHA & C. B. ST. RY. CO. ET AL., V. INTERSTATE COMMERCE COMMISSION, (179 FED., 243.)

(Circuit Court, D. Nebraska. April 25, 1910.)

CARRIERS (§24*)—Interstate Carriers—Regulation of street railroads. Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), or its amendments (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), being acts to regulate commerce do not apply to street railway companies engaged in the transportation of passengers between cities in different states.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. §24*].

IN EQUITY. Suit by the Omaha & Council Bluffs Street Railway Company and another against the Interstate Commerce Commission. Motion for a preliminary injunction granted.

JOHN LEE WEBSTER, for complainants.

P. J. FARRELL and CHARLES A. GOSS, for defendant.

Before SANBORN, HOOK and ADAMS, Circuit Judges.

PER CURIAM. Whereas, the complainants are street railway companies engaged in operating street cars for the transportation of passengers on the streets of Omaha and Council Bluffs, and are not commercial railroad companies engaged in the general transportation of freight and passengers, and the Interstate Commerce Commission by its order dated November 27, 1909, required them to cease demanding or receiving their fares of 15 cents per passenger for the transportation of passengers from Council Bluffs, not including Courtland Beach, Iowa, to points on complainants' lines in Omaha, Nebraska, or from points on complainants' lines in Omaha, Nebraska,

to Council Bluffs, Iowa, not including Courtland Beach, Iowa, and also required them to establish and to maintain for two years a less rate.

And, whereas, the judges are of the opinion that the Congress never intended that the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [3 U. S. Comp. St. 1901, p. 3154]), or its amendments (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), should apply to, and they are of the opinion that they do not apply to such street railway companies, that no power has been delegated thereby to the Interstate Commerce Commission to regulate or affect the rates of transportation of such companies, and that the order of the Interstate Commerce Commission was beyond its powers, and ought not to be enforced during the pendency of this suit. *Louisville & Portland Ry. Co. v. Louisville City Ry. Co.*, 2 Duv. (63 Ky.) 175-178; *Funk v. St. Paul Ry. Co.*, 61 Minn. 435, 437, 441, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. Rep. 608; *State v. Duluth Gas & Water Co.*, 76 Minn. 96, 108, 78 N. W. 1032, 57 L. R. A. 63; *Manhattan Trust Company v. Sioux City Cable Ry. Co.* (C. C.) 68 Fed. 82, 86 Congressional Record, vol. 17, part 4, p. 3472; *Railroad Commissioners v. Market Street R. R. Co.*, 132 Cal. 677, 678, 679, 682, 683, 64 Pac. 1065; *Gyger v. West Philadelphia Ry. Co.*, 136 Pa. 96, 108, 20 Atl., 399; *State of Kansas v. Grant Cain*, 69 Kan. 186, 189, 190, 76 Pac. 443; *Railroad Company v. Railroad Commissioners*, 73 Kan. 168, 169, 173, 84 Pac. 755; *Sams v. St. Louis, etc., Ry. Co.*, 174 Mo. 53, 64, 69, 74-77, 81, 73, S. W. 686, 61 L. R. A. 475; *Thompson Houston, etc., Co. v. Simon*, 20 Or. 60, 75, 25 Pac. 147, 149, 10 L. R. A. 251, 23 Am. St. Rep. 86; *Front Street Cable Ry. Co. v. Johnson*, 2 Wash. St. 112, 25 Pac. 1084, 1085, 11 L. R. A. 693;

Riley v. Galveston City R. R. Co., 13 Tex. Civ. App. 247, 35 S. W. 826, 827.

It is hereby ordered that the aforesaid order of the Interstate Commerce Commission of date November 27, 1909, be, and the same is hereby, suspended, and the Commission, its attorney, agents, and employees, are hereby restrained and enjoined from enforcing it until the final decision of this suit or the further order of the court.

This order shall take effect upon the filing with the clerk of the court of a bond in the sum of $10,000, approved by one of the judges of this court, and conditioned that the complainants will pay any and all damages which result from the making of this order in case the order shall not be sustained."

EXCERPTS FROM THE CONSTITUTION AND STATUTE LAWS OF THE STATE OF NEBRASKA.

Article XI of the Constitution of Nebraska, adopted 1875, contains provisions relating to the creation and regulation of "railroad corporations." Sections 3, 4 and 8 of said Article XI severally provide:

"Sec. 3. No railroad corporation, or telegraph company, shall consolidate its stock, property, franchises, or earnings in whole or in part, with any other railroad corporation or telegraph company owning a parallel or competing line; and in no case shall any consolidation take place, except upon public notice of at least sixty days, to all stockholders, in such manner as may be provided by law."

"Sec. 4. Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared *public highways,* and shall be free to all persons for the transportation of their *persons and property thereon,* under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable *maximum rates of charges for the transportation of passengers and freight* on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited."

Article XIb of the Constitution of the State of Nebraska under the heading of "*Miscellaneous Corporations*" relates in part to street railway companies and provides in Section 2:

"Sec. 2. No such general law shall be passed by the legislature granting the right to construct and operate a *street railway* within any city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof."

Sections 72, 73 and 75 of Chapter 16, Compiled Statutes, 1911, p. 596-7:

"Sec. 72. Any number of natural persons, not less than five, may become a body corporate with all the rights, privileges and powers conferred by, and subject to all the restrictions of this subdivision."

"Sec. 73. Any number of persons, as aforesaid, associating to form a company for the purpose of constructing a railroad, shall, under their hands, make a certificate, which shall specify as follows: *First*—The name assumed by such company and by which it shall be known. *Second*—The names of the places of the termini of said road, and the *county or counties through which said road shall pass. Third*—The amount of capital stock necessary to construct such road. Such certificate shall be acknowledged before a notary public, and certified by the clerk of the district court in the same manner as is provided for the conveyance of real estate, and shall be forwarded to the secretary of the state, who shall record and carefully preserve the same in his office; and a copy thereof duly certified by said secretary, under the seal of the state, shall be *prima facie* evidence of the existence of such corporation."

"Sec. 75. Such corporation shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate, and enjoy a railroad with single or double tracks, with such sidetracks, turnouts, offices and depots as shall be necessary, between the places of the termini of the said road, commencing at or within, and extending to or into any town, city or village named as the termini of said road, and construct branches from the main line to other towns or places within the limits of this state. Provided, further, that any railroad company heretofore organized or hereafter to be organized for the construction and operation of a railroad whether by steam or other motive power, shall have the right and power to transmit over its right of way currents of electricity for the pur-

pose of operating telegraph and telephone lines and for the purpose of supplying power for the use of said railroad and the use of others."

Section 1, Article 7, Chapter 72:

"Any number of persons may be associated and incorporated under the general laws of this state providing for the creation of corporations for the purpose of constructing and operating a *street railroad* within any of the *cities* of this state, upon procuring the *consent* of a majority of the electors of any such city as hereinafter provided."

"*And provided further,* That no franchise to construct street railways shall be hereafter granted, nor shall any election be hereafter held to vote upon any proposition to give the consent of the electors of any such city to the construction of any street railway, unless there shall have been filed, at least ten days before such election, a map or plat showing the route and location of the proposed street railway in the county office wherein are kept the record of deeds of real estate and also whether the proposed railway along such route is to be a single or double track."

Section 5 of Article 7 contains the following provisions:

"But no *street railway* shall hereafter be constructed, or consent or authority therefor be given by any city, or its electors, upon, or along any part of any street in any city upon or along which any street railway has been already constructed, and where any other company or party owns any street railway upon any part of such street it is hereby authorized and empowered to consent to the use of any part of its railway by any other company upon such terms as may be agreed upon by them; *Provided,* That no such use shall be allowed or enjoyed without its consent; *Provided further,* That no authority to

construct street railway on any street of any city in this state under any franchise hereafter granted, or consent of the electors of any such city thereto hereafter given, shall be operative or effective unless the owners of a majority of the feet front of the real property abutting upon the street or streets upon which it shall be proposed to construct any such street railway shall in writing consent thereto, which written consent shall be filed in the office of the city clerk of the city wherein such street is situated before any election to give the consent of the electors of such city shall be called."

Sec. 12 of Article 7, Chapter 72, reads:

"The word '*street railway,*' as used in the foregoing section, shall be constructed to embrace all *street railroads* built and operated for the convenience of *passengers* along the streets and alleys and public thoroughfares of cities in this state."

Sec. 12a of Article 7, Chapter 72.

"Any street railway company, whose line or lines of street railway are constructed to the corporate limits of the city in which it owns and operates a street railway system, may extend one or all of its lines so constructed beyond such corporate limits for a distance not exceeding ten miles. When the line or lines of railway constructed and owned by an inter-urban company connect with the line or lines of railway of a street railway company, a street railway company may for the purpose of extending its service into the suburbs, purchase or lease so much of the railway of an inter-urban company as lies outside the corporate limits of the city, not exceeding in length ten miles from the corporate limits."

SUPREME COURT OF NEBRASKA

STATE EX REL. TYRRELL,
Plaintiff,
vs.
LINCOLN TRACTION CO.,
Defendant.

No. 17232.

OPINION FILED JAN. 3, 1912.

2. Section 3, Art. XI of the Constitution, which prohibits the consolidation of the stock, property, franchises or earnings in whole or in part of railroad corporations and telegraph companies owning parallel or competing lines, does not apply to street railway corporations not engaged in general railroad or telegraph business.

3. Section 5, Art. XI of the Constitution, which forbids a railroad corporation issuing any stocks or bonds except for money, labor or property actually received and applied to the purposes for which such corporation was created, does not apply to street railway corporations not engaged in general railroad business.

ROOT, J. The state invokes Art. XI of the Constitution to sustain its contention that the stock and bond issues should be cancelled and the consolidation adjudged null and void. Among other things Sec. 3 of Art XI, *supra,* forbids the consolidation of the stocks, property, franchises or earnings of two or more railroad corporations or telegraph companies owning competing or parallel lines and section 5 of that article provides that no railraid corporation "shall issue any stock or bonds, except for money, labor or property actually received and

applied to the purposes for which such corporation was created: and all stock, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void."

In *City of Lincoln vs. Lincoln Street R. Co.*, 67 Neb., 469, 483, it was suggested but not determined that these provisions of the constitution do not apply to street railway companies. In the instant case we are of opinion that the point is fairly presented and should be determined. No such limitations appear in the constitution of 1866. It is a matter of common knowledge that many of the provisions of our constitution were taken from the 1870 constitution of Illinois. Sections 3, 5, Art. XI of the Constitution of Nebraska, are quite similar to sections 11, 13, Art. XI of the 1870 Constitution of Illinois. In 1870 the agitation which gave birth to the granger laws of the Western states was active, and the people of Illinois were determined that competition should continue between the common carriers for hire of freight and passengers. These conditions existed in a more acute form in Nebraska in 1875 when our present constitution was adopted. The evils growing out of the circulation of railroad stocks and bonds that had been issued without consideration or for a grossly inadequate consideration, were also known in 1870 and in 1875. But so far as we are advised street railways were not during those years considered an inviting field for exploitation and the people of Nebraska gave that subject no more thought than to adopt Section 4, of Art. XI, which forbids the general assembly to grant the right to construct or operate a street railroad within the limits of any city, town or incorporated village without the consent of the local authorities having

control of the streets and highways of the municipality. As we are advised but one street railway had been constructed in this state in 1875.

In section 72 *et seq.*, ch. 25, Rev. St. 1866, may be found comprehensive provisions for the incorporation by general law of railroad companies. But it was not until 1877 that the legislature enacted statutes referring specifically to the incorporation of street railway companies. (Laws, 1877, p. 135.) It is not improbable that theretofore such corporations might have been formed under the provisions of section 123 *et seq.*, ch., 25, Rev. St. 1866, relating generally to corporations, yet in 1867 the territorial legislature granted a special charter to the Omaha Horse Railway Company to construct and operate a street railway in the city of Omaha and within a radius of five miles of its limits. The legislature by the act of February 25, 1875, purported to grant to the first corporation that should build and operate a street railway in any of the cities in Nebraska, exclusive franchises for 25 years. Complete Session Laws, p. 884. In 1875, Omaha was the only city in Nebraska containing sufficient population to justify the maintenance of a street railway. At that time there were no evil practices with respect to street railways to be remedied in Nebraska and no reason to expand by construction the popular definition of the word "railroad." In its broadest significance that word includes a street railway but its meaning depends upon the context and general intent of the written law in which it is used. *City of Chicago vs. Evans*, 24 Ill., 52. Because the administrative branch of the government by a practical construction of a revenue law had construed the word "railroad" to mean street railways, the supreme court of Florida so held.

Bloxham vs. Consumers' E. L. & Street R. Co., 36 Fla., 519, 51 Am. St. Rep. 44. But it is said in substance in that case by Liddon, J., that the word generally applies to commercial railways engaged in the transportation for long distances of freight and passengers, whereas, the words "street railway" apply solely to railways laid upon the surface and grade of the street and so constructed as not to exclude the public from the use of that part of the street.

In *State vs. Duluth Gas & Water Co.*, 70 Minn. 96, 107, Mitchell, J., in classifying street railways and railroads said "Speaking generally, a street railway is local, derives its business from the streets along which it is operated, and is in aid of the local travel upon those streets, while a commercial railway usually derives its business, either directly, or indirectly through connecting roads, from a large area of territory, and not from the travel on the streets of those cities, either terminal or way stations, along which they happen to be constructed and operated. In fact, so far from being an aid or advantage, they are a positive impediment, to the travel on such streets." See also *Caril vs. Stillwater Street R. & T. Co.*, 28 Minn., 373; *Minneapolis & St. P. S. R. R. Co. vs. Manitou Forest Syndicate*, 101 Minn., 132; 112 N. W. 13; *Louisville & P. R. Co. vs. Louisville City R. Co.*, 2 Duval (Ky.), 175; *Lincoln Street R. Co. vs. McClellan*, 54 Neb. 672.

The terms of a constitution should be construed according to their plain and ordinary acceptation unless it is evident they were used in a legal or technical sense.

State vs. Bacon, 6 Neb., 286.
State vs. Lancaster County, 6 Neb., 474.

Hamilton Natl. Bank vs. American Loan & Trust Co., 66 Neb., 67.

Wilcox vs. People, 90 Ill., 186, 196.

Considering the mischief which article XI of the constitution was adopted to remedy, the general history of the state in 1875 and giving the words in sections 3 and 5 of that article their ordinary meaning, we are of opinion that those sections were not intended to, do not purport to, and do not as a matter of law relate to, street railways. These constitutional provisions, therefore, do not authorize the court to dissolve the respondent or to cancel any part of its capital stock.

[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 846.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY AND OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY, APPELLANTS,

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, APPELLEES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF AND ARGUMENT ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

PLEADINGS.

In February, 1910, appellants filed a bill in equity in the Circuit Court of the United States for the Northern District of Nebraska, against the Interstate Commerce Commission, praying for a temporary and permanent injunction suspending and restraining the enforcement of an order of the commission entered on the 27th day of November, 1909. The order required the appellants "to cease and desist, on or before the first day of February, 1910, from charging, demanding, collecting, or receiving their

present fare of 15 cents per passenger for the transportation of passengers from Council Bluffs, Iowa, not including Courtland Beach, Iowa, to points on defendants' lines in Omaha, Nebr., or from points on defendants' lines in Omaha, Nebr., to Council Bluffs, Iowa, not including Courtland Beach, Iowa," and further requiring the appellants "to establish on or before the first day of February, 1910, and maintain in force thereafter during a period of not less than two years, a charge for the transportation of passengers" upon the lines and between the points above named "which shall not exceed 10 cents per passenger."

The Interstate Commerce Commission filed a demurrer to said bill, excepting paragraph 10, and an answer to paragraph 10, admitting its allegations and setting up the report and conclusions of the commission referred to in, and made a part of, said order.

The application for a preliminary injunction was heard by the Circuit Court, all parties appearing, on the 2d day of March, 1910, and on the 25th day of April, 1910, a temporary restraining order was granted by the Circuit Court.

The case was transferred to the United States Commerce Court on the 3d day of April, 1911, and the United States intervened and filed a motion to dissolve the injunction and dismiss the petition.

The case was heard upon the bill of complaint, the demurrer and answer of the Interstate Commerce Commission and the motion by the United States.

STATEMENT OF FACTS.

1. The Omaha & Council Bluffs Street Railway Company owns the street railway lines in the city of Omaha and adjacent municipalities in Nebraska; it leased from appellant the Omaha & Council Bluffs Bridge Railway Company, under a long lease, the street car lines of Council Bluffs, Iowa, the toll bridge, and the interurban line over the Missouri River connecting the street car systems in these two cities; *this appellant maintains and operates all of the car lines in both cities and across the bridge and the toll bridge, which also accommodates wagons, foot passengers, etc.*

The other appellant, Omaha & Council Bluffs Bridge Railway Company, *is not now an operating company.*

The controversy in this case, therefore, is wholly with the Omaha & Council Bluffs Street Railway Company.

2. The Omaha & Council Bluffs Railway & Bridge Company, now the lessor, was organized under the laws of Iowa in October, 1886, with power to construct, operate, and maintain a bridge across the Missouri River at and opposite the cities of Omaha, Nebr., and Council Bluffs, Iowa, and also a *steam, electric, motor, horse, elevated, cable, or other line of railway,* and a public highway across a bridge within the counties of Douglas, Nebr., and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs, with all the privileges given it by law and such as are usually extended to corporations of this character.

3. By an act of Congress approved March 3, 1887, authority was granted to the bridge company, "its successors and assigns," to construct and maintain a toll bridge across the Missouri River between the cities of Omaha and Council Bluffs, "as shall best promote the public convenience and welfare and the necessities of business and commerce," to be—

> constructed, maintained, and used as a combined highway and wagon bridge for the safe and convenient passage of wagons, carriages, stock, steam, cable, and street cars, foot passengers, and all road travel * * *, and said bridge shall be recognized and known as a post route * * * and enjoy the rights and privileges of other post routes in the United States; and Congress reserves the right at any time to regulate, by proper legislation, the charges for freight and passengers over said bridge; all railroad companies desiring the use of said bridge shall have and be entitled to equal rights and privileges relative to the passage of railway trains or cars over the same and over the approaches thereto upon payment of a reasonable compensation for such use; * * * that the United States shall have the right of way for such postal and telegraph lines across the said bridge as the Government of the United States may construct and control.
>
> That Congress shall have power at any time to alter, amend, or repeal this act. (U. S. Stat. L., vol. 24, chap. 356, p. 501.)

The toll bridge across the Missouri River and street railway lines in Council Bluffs, with a line extending

over and across the bridge to the west end thereof, were constructed by the bridge company and operated until about December, 1902. By an arrangement with the Omaha Street Railway Company the cars crossing the bridge passed the western terminus of the bridge and over the lines of the street railway around a loop in the business portion of Omaha, returning across the bridge to Council Bluffs. The fare charged by the bridge company during the time that it operated these lines was 5 cents within Council Bluffs and 5 cents additional per passenger crossing the bridge to any point on the loop, making the fare from *any point* in Council Bluffs to any point *on the loop* in Omaha 10 cents per passenger.

4. The Omaha & Council Bluffs Street Railway Company is organized under the laws of the State of Nebraska, and owns all of the street-car lines in the city of Omaha and the suburbs named. Up to December, 1902, it operated said street-car lines wholly within the State of Nebraska and charged a flat fare of 5 cents per passenger.

5. In December, 1902, the bridge company leased all of its property, including the bridge and the street railways in Council Bluffs, to the Omaha & Council Bluffs Street Railway Company for a period of years, and since that date the toll bridge, the street-car lines in Council Bluffs, and the interurban line over and across the bridge to Omaha have been and are now operated by the Omaha & Council Bluffs Street Railway Company, which company, as is alleged in the sixth paragraph of the bill, "has the absolute

and unlimited control over the said line of said railroad * * * [bridge company's lines] and receives all rents, fares, and revenues derived in the said operation of said line of electric street railroad, including the said bridge, and utilizes its own cars and its own employees in operating these railways.

It is alleged in the bill that after the execution of the lease the cars were operated in the same manner as before. A charge of 10 cents per passenger is made between *any point* in Council Bluffs across the bridge to or from any point upon the loop, and in addition a charge of 5 cents upon the company's car lines in Omaha, making a through fare either way from or to *any* point in Council Bluffs from or to *any point* in Omaha 15 cents. The company sells a commutation ticket entitling the purchaser (nontransferable) to 30 rides for $1.50, or 5 cents between *any point* in Council Bluffs to *any point on the loop* either way.

6. A complaint was filed with the Interstate Commerce Commission and an investigation instituted regarding the alleged unreasonableness of the rates charged to interstate passengers by the complainants, Omaha & Council Bluffs Street Railway Company, over the lines which it operated as owner and lessee. After a full hearing and due consideration of all facts pertaining to the question the commission announced its opinion and conclusions "that a reduction of defendant's fare [Omaha & Council Bluffs Street Railway Company] of 10 cents to 5 cents would not be justified, but that *limiting the 10-cent fare to points on the loop in Omaha* is unjust

and unreasonable, and that the fare from Council Bluffs, not including Courtland Beach, to any point on defendant's lines in Omaha or from any point on defendant's lines from Omaha to Council Bluffs, not including Courtland Beach, should not exceed 10 cents for a continuous trip or for a trip upon which passenger conforms to proper and reasonable regulations governing the use of transfer tickets, if transfer is required." Upon these conclusions the order complained of was entered.

7. Upon the foregoing facts the Commerce Court held:

> The lines from the bridge in Omaha to and through the loop do not constitute a system separate and distinct from those beyond the loop. Both are under the common ownership, control, and operation of the street railway company. Local passengers pay a single fare within the city of Omaha between all points, receiving the necessary transfers at junction points to and from the loop.
>
> The question presented was, therefore, not whether an independent company operating solely in Omaha beyond loop points and exchanging transfers solely for local passengers with an interstate company operating the loop lines could be compelled to give transfers to interstate passengers as well—as to which we intimate no opinion—but whether or not the interstate company, operating all the lines as one system, the parts of which are independently operated only in a physical sense, in that transfers are necessary from and to the loop,

could be compelled, without additional compensation, to carry an interstate passenger to a point on its own lines beyond the loop district; in other words, whether 15 cents is or is not a reasonable fare to be paid for the entire interstate journey made on the several lines operated by the street railway company.

* * * * *

If the language be broad enough to include such a corporation as the present street railway company, and there is no contention but that "railroad" may be and frequently is synonymous with or inclusive of "street railways," it is, moreover, immaterial that Congress may not specifically have intended to confer jurisdiction over the few comparatively insignificant interstate horse street railways of 25 years ago.

A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted—any more than the Constitution—in accordance with the economic or physical conditions prevailing at the time of its adoption. Then, too, the decision in *Wabash, St. Louis, etc., Railway Co.* v. *Illinois* (118 U. S., 557), definitely denying to the States the right to fix or regulate interstate rates for passengers, and thereby necessitating some congressional action, is as applicable in its reasoning to interstate street railway rates as to those of commercial railroads. Unless the commission has jurisdiction over those rates they are absolutely uncontrolled.

* * * * *

Finding substantially nothing either in the language of the statute or in the history of this legislation that indicates an intent to exclude interstate passenger street railways from its operation, and finding, on the contrary, that the words of the act are broad and comprehensive enough to include them and that some at least of the evils sought to be remedied by this legislation can be corrected only if the commission have such jurisdiction, we are compelled to differ from the views expressed by the Circuit Court in granting the preliminary injunction, and to hold that power has been delegated to the commission to regulate rates of transportation by such companies as the complainants herein, which requires us to sustain the demurrer of the defendants and to dismiss the bill. And it is so ordered.

From this decision an appeal was taken to this court.

QUESTIONS OF LAW.

I.

The power of Congress to regulate commerce is not confined to any particular agency or instrumentality.

The power of Congress is determined by two clauses of the Federal Constitution: (1) * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes * * *. Art. 1, sec. 8, para. 3. (2) * * * To make all laws which shall be necessary and proper for carry-

ing into execution the foregoing powers, * * *. Art. 1, sec. 8, par. 18.

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. *Gibbon* v. *Ogden* (9 Wheat., 1, 196); *McCulloch* v. *State of Maryland et al.* (4th Wheat., 316); *Employers' Liability Case* (207 U. S., 493).
>
> It will be observed that in fixing the power of Congress to regulate, no reference is made to the kind or character of the agency, or instrumentality used in such commerce. It is the commerce itself which determines the jurisdiction of Congress over it. If it is commerce between the States, no matter how it may be carried on, it falls within the exclusive jurisdiction and power of Congress. *Gibbon* v. *Ogden, supra.*

In *Hopkins* v. *United States*, 171 U. S., at page 597, this court, speaking through Mr. Justice Peckham, said:

> Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate

it embraces all the instruments by which such commerce may be conducted. *Welton* v. *Missouri*, 91 U. S., 275; *Citing Mobile County* v. *Kimball*, 102 U. S., 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196; *Hooper* v. *California*, 155 U. S., 648, 653; *United States* v. *E. C. Knight Co.*, 156 U. S., 1.

Commerce as used in the commerce clause of Constitution has reference to transportation, that is, the movement of either property or persons. *Chicago, etc., R. Co.* v. *Fuller* (17 Wallace, U. S., 560).

The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which Congress may regulate * * * no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that Government, which has been thought best fitted for the purpose generally. *Gibbon* v. *Ogden, supra;* see also *Passenger Cases* (7th Howard, U. S., 283).

II.

Congress exercises its regulating power by direct legislation and through the Interstate Commerce Commission acting under the powers granted by the act to regulate commerce.

Congress exercises its regulating power by appropriate legislation executed by administrative officers and mainly by the Interstate Commerce Commission.

Act to regulate commerce, as amended, and acts supplementary thereto.

Texas, etc., R. Co. v. *Interstate Commerce Commission* (162 U. S., 197).

Cincinnati, etc., R. Co. v. *Interstate Commerce Commission* (162 U. S., 184).

Baltimore & Ohio Railroad Co. v. *U. S. ex rel., etc.* (215 U. S., 481).

Interstate Commerce Commission v. *C., R. I. & P. Ry. Co.* (218 U. S., 88).

Southern Pacific Company v. *Interstate Commerce Commission* (219 U. S., 433).

Southern Pacific Terminal Co. v. *Interstate Commerce Commission* (219 U. S., 498).

Interstate Commerce Commission v. *D., L. & W. R. R. Co.* (220 U. S., 235).

III.

The act to regulate commerce as amended defines the carriers subject to the act.

That the provisions of this act shall apply to * * * any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad * * * from one State * * * to any other State or Territory of the United States * * *:

Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property * * * wholly within one State * * *.

The term "railroad" * * * shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, * * *; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage * * *; and it shall be the duty of every carrier subject to the provisions of this act * * * to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations * * * for the operation of such through routes and providing for reasonable compensation to those entitled thereto. Section 1, act to regulate commerce.

Every common carrier subject to the provision of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting line; * * *. Section 3.

> The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, * * *.
>
> And in establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, * * *. Section 15.

It will be observed that Congress in conferring this power upon the Interstate Commerce Commission limited it to "interstate commerce" carried on by certain agencies and instrumentalities. In so far as the issues in this case are concerned, the agency and instrumentality which determines the jurisdiction of the Interstate Commerce Commission are a "common carrier" transporting passengers *or* property wholly by railroad (and a bridge) from one State to another State. Nothing is said in the act as to the motor power that shall be used by the carrier, or the size or character of the vehicles used, or the nature of the roadway, excepting that it shall be a "railroad" or a "bridge."

IV.

Congress and the Interstate Commerce Commission have jurisdiction over a common carrier operating cars by electricity, and the fact that it is an electric street railway does not exempt it from such regulating power.

LEGISLATIVE CONSTRUCTION.

The act to regulate commerce has received legislative construction. The Rock Creek Railway Company of the District of Columbia owns and operates an electric railroad between the city of Washington, D. C., and Chevy Chase, Maryland. The length of the road is approximately seven and one-half miles, of which five and one-half miles are in the District of Columbia and the remainder in the State of Maryland. This road operates as a street-car line in all particulars, stopping at any street crossing to receive or discharge passengers. In a complaint filed against this company it was held by the commission:

> We can not sustain defendant's contention that the act to regulate commerce applies only to the ordinary steam railways by which interstate traffic is mainly carried, and that street surface roads for urban and suburban passenger travel are exempt from its provisions. * * * We see no reason to doubt that the authority of this enactment may be invoked for the regulation of carriers like the defendant, if their business is actually interstate, whenever occasion arises for subjecting them to its restraints and requirements. *Willson* v. *Rock Creek R. Co.* (I. C. C. Rep., vol. 7, 83, 88.)

The above decision was rendered March 12, 1897.

See also *Chicago & Milwaukee Electric R. R. Co.* v. *Illinois Central R. R. Co. et al.* (13 I. C. C. Rep., 20), decided December 2, 1907; *O. C. Beall* v. *Washington, Alexandria & Mt. Vernon Ry. Co.* (20 I. C. C. Rep., 406), decided February 13, 1911; *Cincinnati & Columbus Traction Co.* v. *B. & O. S. W. R. R. Co. et al.* (20 I. C. C. Rep., 486), decided March 14, 1911.

Subsequently, in 1910, Congress, with knowledge that the Interstate Commerce Commission had taken jurisdiction of this Wilson case and other electric street railways carrying interstate passengers, amended the act to regulate commerce in several particulars, among which amendments is a provision, incorporated in section 15, reading as follows:

> The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character.

This exception to powers then being granted shows that Congress understood that street electric passenger railways were subject to the act if they transported passengers from a point in one State or Territory or the District of Columbia to a point in another State. For, as Chief Justice Marshall so well reasoned with reference to powers granted to Congress by the Constitution of the United States, "Limitations of a power furnish a strong argument in favor of the existence of that power." *Gibbon* v. *Ogden, supra.*

If the act to regulate commerce did not include "street electric passenger railways" there was no reason for excepting this class of railways from the additional power conferred upon the commission to establish through routes and joint rates.

JUDICIAL CONSTRUCTION.

The street railroad is a common carrier. *State ex rel. Grinsfelder* vs. *Spokane Street R. Co.* (53 Pac., 719).

Technically, a railroad is a way or road upon which iron rails are laid for wheels to run on for the conveyance of heavy loads and vehicles. *Densmore* v. *Racine M. R. Co.* (12 Wis., 649).

The term "railroad" as applied in our general legislation relates to interests of quasi-public character, to highways or roads constructed by the authority of a State, with fixed metallic rails on which carriers may propel their carriages or cars speedily in the transportation of passengers and freights. Any way or road having these characteristics is a railroad. It is the mode of construction and chartered used and not the motive power that determines the character of a railroad. *McCleary* v. *Babcock* (82 N. E., 453, 456).

So it appears, after all, we must look to the context of the statute before the court, and, upon taking into account its object and purpose, determine in each case upon its peculiar facts, the meaning of the word "railroad" therein employed, when endeavoring to ascertain to what class or character of railroads the

> legislature intended to provide the legislation provided, and in no case can an actual determination and the result be had except by constant vigil as to the mischief sought to be prevented and the remedy sought to be provided by the act. *Riggs* v. *San Francois County Ry. Co.* (96 S. W., 707, 708.)

There are very many cases wherein the State courts have been called upon to construe the word "railroad" used in general statutes providing for taxation, fencing right of way, employers' liability acts, liens, crossings, rolling stock, etc., and the general rule above stated has been applied in determining whether the statutes applied to street railways. In some of these cases it was held to apply, and in many others the statutes under consideration have been held inapplicable to street railroads.

In Pennsylvania an act provided that—

> The offices, depots, car houses, and other real property of railway corporations, * * * the superstructure of the road and water stations alone excepted, should be subject to taxation by ordinance.

The Supreme Court of Pennsylvania said: "The words 'railway' and 'railroad' have been used indiscriminately by the legislature and have no strict technical meaning in our statutes * * *. The rule established by our decisions is that these words used in the statutes will be considered as synonymous, and either will be held to apply to both kinds of road unless there appears from the title of the act, its pur-

pose or context, something to indicate that a particular kind of a road is indicated."

Citing—

Heastonville R. R. Co. v. *Philadelphia* (89 Pa., 210).

Gyger v. *Phila. City Pittsburg R. Co.* (136 Pa., 96).

Cheaton v. *McCormick* (178 Pa., 186).

Old Colony Trust Co. v. *Rapid Transit Co.* (192 Pa., 596).

Penn. R. Co. v. *Pittsburg* (104 Pa., 552).

A traction company has but little resemblance to a street railway company, and more to a construction or power company; but when, as in this case, it operates a railway and leases the property and franchises of various railway companies and operates them on its account, it is exercising the functions of a street railway company, as it is authorized to do, and it enjoys the privileges granted to and becomes subject to the liabilities imposed by law upon such companies. This view is in harmony with all of our decisions touching the subject.

Rafferty v. *Central Traction* (147 Pa., 579).

Reeves v. *Phila. Tr. Co.* (152 Pa., 153).

Old Colony Trust Co. v. *Allentown, etc.* (192 Pa., 596).

Employers' Liability Cases (207 U. S., 463, 497).

Applying this rule of construction to the act to regulate commerce, we find that the general purposes of the act are to provide and control the regulation of quasi-public corporations that are carrying passengers or property from one State, Territory, or the District

of Columbia to another State, Territory, or the District of Columbia. This power of regulation having been vested in Congress can only be exercised under the authority of Congress, and as to all railroad companies engaged in such transportation the act is intended to provide a complete and reasonable exercise of that power. If the act does not apply to electric street railways carrying on interstate transportation, then there is no power that can regulate, in the interest of the public, this interstate traffic; such traffic would be wholly outside of any regulating power. Regarding the "mischief" to be prevented and the remedy provided, the act applies to all interstate commerce by railroad.

But we are not without the authority of the Supreme Court in insisting that this power extends to such lines of railroad.

Construing the first section of the act to regulate commerce, the Supreme Court of the United States, speaking through Mr. Justice White, now Chief Justice, said:

> From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc. Now, the rule which the statute establishes for the purpose of de-

> termining whether all the subjects to which it relates are to be controlled by its provisions is that any one who conducts such business be a "common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States," etc. That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the States, etc. Employers' Liability cases, supra.

This comprehensive language includes trolley lines and every common carrier engaged in interstate traffic by railroad.

V.

The appellants are not ordinary street car companies; they are bridge and railway companies. The bridge company was not organized as a "street" railway company, but as a "railway and bridge company," and its lessee, as operating company, is exercising these functions.

The name of the lessor includes the names of cities in two States, between which transportation was to be and is carried on, Omaha and Council Bluffs Railway and Bridge Company. This is true also of the lessee, Omaha and Council Bluffs Street Railway Company, which shows an intention to carry on interstate commerce. The first company, organized in 1886, was given power by Congress to construct, operate, and maintain a bridge crossing the Missouri River at a point opposite the cities of

Omaha, Nebraska, and Council Bluffs, Iowa, and a "*steam, electric, motor, horse, elevated, cable, or other line of railway.*" and this power extends to "its successors and assigns," the lessee. The act further provides that said bridge and all property belonging thereto and connecting therewith may be constructed, maintained, and used as a combined railway and wagon bridge for the safe and convenient passage of wagons, carriages, stock, steam, cable, and street cars, foot passengers, and all road travel. * * * And Congress reserves the right, at any time, TO REGULATE, "*by appropriate legislation,*" *the charges* for freight and passengers over said bridge.

Traffic over a bridge spanning navigable waters separating two States is interstate commerce. *Covington & Cincinnati Bridge Co.* v. *Kentucky* (154 U. S., 204) and cases cited.

The character of the bridge company's railway is stated in the commission's report, page 243:

> In the instant case it should be remembered that the defendants have the characteristics of an interurban line as well as of a street railway. They operate 136 single-track miles of road; the rails are not all laid in public streets and highways, but for some distance run over private right of way; they operate over the bridge across the Missouri River, and through sparsely settled sections over expensive culverts not conforming to the level of the streets or roads; they carry the United States mail and do not serve the needs of a single city and its suburbs, but of two cities and several towns, villages, and resorts.

And on page 248 it is said:

> that along the line from the east bank of the Missouri River to the city of Council Bluffs for a distance of about three miles there is a large territory which is but sparsely settled and from which but little revenue is derived.

The railroad is an interurban road connecting two cities located respectively in two States, and such transportation and facilities constitute interstate commerce.

> *Gibbon* v. *Ogden, supra.*
>
> *Gloucester Real Co.* v. *Pennsylvania* (114 U. S., 196).
>
> *Munn* v. *Illinois* (94 U. S., 113).
>
> *C., B. & Q. R. Co.* v. *Iowa* (94 U. S., 155).
>
> *Wabash, St. L. & P. R. Co.* v. *Illinois* (118 U. S., 557).

The Omaha & Council Bluffs Railway & Bridge Company was at the beginning and is, so far as its interests are concerned at the present time, a common carrier of interstate commerce. It is the owner, and until 1902 operated, the interstate bridge and the interstate railroad between Council Bluffs and Omaha, and as such carrier was and is subject to the regulating power of Congress and of the Interstate Commerce Commission.

VI.

When the Omaha & Council Bluffs Street Railway Company voluntarily leased the bridge and lines of the Bridge Company it entered the field and became an agent of interstate commerce. It succeeded to

all the rights and privileges, and with these the obligations, duties, and responsibilities of the lessor company. What the lessor could do the lessee undertook to do and is doing. What its powers are under the constitution and laws of Nebraska are immaterial to the decision of this case. Its acts may be ultra vires, but it can not plead that against the power to supervise its interstate business. It is the fact that, right or wrong, it has assumed to carry interstate passengers, and is doing it, that determines the jurisdiction of the commission.

While it is alleged in the bill "that after the execution of the said lease from the Council Bluffs Co. to the Omaha Company the same manner of operating the cars of the Council Bluffs Company was continued," it is not alleged that the operating revenues and expenses of the two lines are segregated. And the bill further alleges that the operating company receives "all fares, rents, and revenues derived in the said operation of the said line of electric street railroad, including the said bridge, and the Omaha & Council Bluffs Street Railway Company utilizes its own cars and its own employees in operating said street railroad." It is an interstate carrier by railroad and therefore is subject to the act to regulate commerce.

The fact is that the Omaha & Council Bluffs Street Railway Company, as owner of the lines in Omaha, as lessee of the bridge, and interstate interurban line, and the lines in Council Bluffs, is the sole operating company and receives and disburses its income from these

lines as a single corporation. These instrumentalities therefore all belong to this company, are subject to its control, and are used in the transportation of interstate passengers. These interstate passengers are conveyed from any part of the city of Council Bluffs across the bridge to the loop in Omaha for a fare of 10 cents, and if they desire to go farther in Omaha they do so upon the company's lines and pay an additional fare of 5 cents, making a through rate either way between any point in Council Bluffs and any point in Omaha outside the loop of 15 cents. It was this through rate that was the subject of the order complained of in the case at bar. The statute declares:

> Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, etc.

Again, it says:

> and it shall be the duty of every carrier * * * to establish through routes and reasonable rates applicable thereto. Sec. 1.
>
> If the carrier fails to obey this law the commission may establish such through routes and rates.

This is what was done by the commission in this case.

VII.

Where several instrumentalities of commerce have been merged in one ownership by purchase or lease and are operated by one company, such instrumentalities, in so far as they are used for interstate commerce, are voluntarily brought under the jurisdiction of Congress and the Interstate Commerce Commission. The fact that one or more of such instrumentalities are used in a greater degree for intrastate business than for interstate business does not lessen the regulating power of the Interstate Commerce Commission over the interstate traffic, and the commission may establish a through route and a joint through rate for interstate traffic over all of said instrumentalities.

In the Social Circle case, this court, speaking through Mr. Justice Shiras, said:

> Having elected to enter into the carriage of interstate freights and thus subject itself to the control of the commission, it would not be competent for the company to limit that control, in respect of foreign traffic, to certain points on its road and exclude other points. *C., N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission, supra.*

And, again, speaking through Mr. Justice White, now Chief Justice, in the Employers' Liability cases, at page 490, already cited, the court said:

> From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates if they engage as common carriers in trade or commerce between the States, etc.

The Social Circle case was dealing directly with an intrastate corporation doing largely an intrastate business, but held, as above stated, that in so far as the company was doing an interstate business it was

brought under the control of Congress and the Interstate Commerce Commission and could not confine such control to any particular part of its road, but that the jurisdiction of the commission was coextensive with the lines of the compamy thus brought under the control of the commission. In the Employers' Liability case, above quoted, this court clearly held that, the agent of interstate commerce being being under the general regulating power of Congress, subjected itself to control by the commission.

In the case at bar interstate passengers from any part in Council Bluffs pass over the State line to any part of the city of Omaha *upon the lines of complainant,* Omaha & Council Bluffs Street Railway Company. For the entire trip these passengers are subjects of interstate commerce. The instrumentalities which are used in their transportation belong to and are operated by this company as an agent of interstate commerce. The agent and all of the instrumentalities come under the regulating power of Congress and the commission in so far as the interstate traffic is concerned.

VIII.

The commission may establish a through route and through rate.

Under the provisions of section 15 as amended the commission is expressly authorized and empowered, upon complaint, or upon its own initiative without complaint, to establish through routes and joint rates in the interest of and to facilitate the interstate traffic. The only limitation upon this power is the one here-

tofore quoted, that the commission "shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character." It is not and can not be claimed that in establishing the through route and through rate from any point in Council Bluffs to any point in Omaha over appellants' lines the electric passenger railway of Omaha was compelled to make a through route or through rate with a railroad of a different character. Neither of these roads carries freight or operates freight cars (so alleged in the bill), but are at present carriers of passengers. The prohibition therefore does not apply in this case. Where the prohibition does not apply the general jurisdiction prevails; as before stated, the exception proves the existence of the general jurisdiction over this subject matter.

The order of the commission in this case is that interstate passengers shall be carried to or from *any point* in Council Bluffs from or to *any point* in Omaha over the complainants' lines for 10 cents per passenger for a continuous trip, subject to proper and reasonable regulations governing the use of transfer tickets, if transfer is required.

IX.

The fact that these corporations are organized under State laws, general or special, as commercial or as street railways does not change the character of the commerce nor exempt the companies actually doing the interstate business from Federal regulation as to the interstate traffic.

With few exceptions all of the agents carrying on interstate commerce are State corporations. From the decision of the Supreme Court of the United States in *Gibbon* v. *Ogden* down to the present time the right of the Federal Government to control these agents has been recognized, and this power has been judicially stated in many cases.

It is the character of the commerce, not the organization of the company, that determines the question of Federal jurisdiction.

X.

The fact that this company does not carry freight, but confines its business to the carrying of passengers, does not exempt it from Federal control.

The statute reads, carriers of passengers *or* property. (*Gibbon* v. *Ogden*, supra; The Passenger Cases, 7 How., 283.)

XI.

Some general questions suggested by the allegations of the bill.

It is claimed that the State of Nebraska, acting through the municipality of Omaha, may control the fares and regulate to some extent the traffic within the city of Omaha, and therefore the Federal Government can not interfere. It is admitted that so far as the purely intrastate traffic over the lines of com-

plainant within the cities of Omaha and Council Bluffs there is no jurisdiction to regulate the fares or the traffic. On the other hand, under the authorities already cited, it is clear that the State of Nebraska has not nor has the municipality of Omaha jurisdiction over the fares for the transportation of interstate passengers. (*Covington Bridge Co.* v. *Kentucky, supra.*) For the same reasons the State of Iowa and the municipality of Council Bluffs have no jurisdiction over the interstate traffic or passenger fares.

It is clear that the only power that can regulate the interstate commerce over these lines is the Federal Government, acting through its commission. If this control is not recognized and maintained by the courts, this interstate rail traffic is entirely outside of any governmental regulating power.

The order of the commission in this case is based upon conclusions reached after a full hearing. There is no allegation in the bill showing that there has been any irregularity in the proceedings. The commission has acted entirely within the statute and within its powers. A consideration of the report will show that all of the matters alleged in the bill were duly considered and weighed by the commission in reaching its conclusion. The nature of the traffic, the extent of the interstate transportation, the facilities and instrumentalities used by the complainant, Omaha & Council Bluffs Street Railway Company, the cost and expense of doing the business, and the comparison of this traffic with other like traffic be-

tween other cities located upon rivers where the connection is by bridge and trolley lines, and the commutation tickets upon which most of the passengers are carried were all considered by the commission as questions of fact, and its conclusions thereon are clearly stated in its report.

The order of the commission extends to all passengers the same rates now extended by the company through its commutation tickets of 5 cents to and from the loop with the Omaha fare of 5 cents added.

This order rests upon sound equity. The people of Omaha, from any point within the city, are given through transportation to any point in Council Bluffs for a fare of 10 cents, and the interstate passenger from any point in Council Bluffs to any point in Omaha is charged a like fare. The establishment of a through route and a single fare from any point in one city to any point in the other, in either direction, is based upon the broadest equities and secures to all interstate passengers uniform treatment and a uniform rate.

Respectfully submitted.

CHARLES W. NEEDHAM,
Solicitor for the Interstate Commerce Commission.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

OMAHA & COUNCIL BLUFFS STREET RAILway Company and Omaha and Council Bluffs Railway and Bridge Company, appellants,
v.
INTERSTATE COMMERCE COMMISSION AND The United States, appellees.

No. 846.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

BRIEF FOR THE UNITED STATES.

The question is whether the Interstate Commerce act applied to the appellants.

The appellant "Omaha & Council Bluffs Street Railway Company" is an interurban electric railway, operating 136 miles of track (tr., pp. 24 and 42) and carrying passengers and United States mail (p. 24) from Omaha and certain adjacent towns, villages, and resorts in Nebraska to Council Bluffs and Courtland Beach in Iowa (tr., p. 5). The line crosses the bridge over the Missouri River between the States of Nebraska and Iowa (p. 24).

The rails are not all laid on public highways, but run for some distance over private right-of-way, and at other points run over expensive culverts not conforming to the level of streets or roads (p. 24).

The appellants claim that the act to regulate commerce does not draw this railway into its field by the following clause (sec. 1):

> That the provisions of this act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment).

The Government claims that even if it were conceded (which it is not) that this clause omits really local, municipal street car lines merely incidentally crossing State boundaries, it still does not omit these interurban, insterstate railroad systems.

FIRST POINT.

The purpose of the act indicates no reason for distinguishing these particular interstate railroads from other interstate railroads.

The purpose of the act is to regulate interstate commerce.

Of course, this purpose may well have stopped short of regulating the unsubstantial and minute portion of interstate commerce represented by the old horse-car lines within municipal settlements. Such lines had never more than a trifling and purely accidental relation to interstate commerce, so far out of proportion to their local character as to make

it perhaps not worth while for Congress to interfere with them.

The road in question, however, is not at all of this sort. It is a railroad system 136 miles in length, running through open country and, in portions of its line, over private right of way. It carries not only passengers, but the United States mail. It taps not only Omaha in Nebraska, but surrounding towns in that State, and connects them with Council Bluffs and other points in the State of Iowa.

Its bearing on interstate commerce is substantial and definite, and if it is not under regulation by the act of Congress it is under no valid control, in so far as concerns its function as interstate carrier. (*Wabash, &c., R. Co.* v. *Ill.*, 118 U. S., 557; *Covington Bridge Co.* v. *Kentucky*, 154 U. S., 204; *Hall* v. *De Cuir*, 95 U. S., 485.)

True, it is a species of railroad which was unknown at the time the act was passed, for then only two varieties of rail road existed—the steam trunk line and the city horse cars. Little by little, through the development of electric science, these two originally distinct kinds of carriers have grown toward each other, until now steam lines, on the one hand, have large portions of electric and trolley service, and the old horse-car lines, on the other, have, by means of the new power, broken through city limits and are engaged in long-distance service. Starting from opposite points, the two kinds of railroads have now met in a middle type known as the

"interurban railroads." In this class of transportation they are rivals and competitors in interstate commerce. Are these interurban railroads within the act when they happen to be operated by the old steam companies, and yet outside it when they happen to be operated by the old horse-car companies?

If the appellant company had been originally an old-fashioned steam railroad, which had embarked into electric interurban service, we assume that no question would be made; nor if, like the New York Central, the New Haven, and the Pennsylvania, entering New York City, it had changed over into electric equipment and power. Can it be decisive that in this case the development has come from the old-fashioned horse car, even though the resultant form of traffic be the same?

The policy of the act does not depend upon the prior history or the individual peculiarity of the corporation which does the operating; it depends upon the scope and nature of the operation itself and its relation to interstate commerce, and for all the purposes of the act in regard to passenger traffic in interstate commerce there is no distinction perceptible to us between these interurban railways and the old railroad lines which now use, and are more and more coming to use, electric power.

This development is only in its infancy, yet already we find systems owning or controlling hundreds of miles of interurban lines. Thus from

Moody's Manual of Railroads for 1911 we may learn that the Boston & Northern Street Railway covers 888 miles; the Interborough Metropolitan and associated companies, 875 miles; the Boston Elevated, 232 miles; the Illinois Traction Company, 445 miles; the Denver City Tramway Company, 200 miles; the Buffalo & Lake Erie Traction Company, 195 miles. From the Electric Railway Journal, Jan. 6, 1912, we find that the Michigan United operates 300 miles and the Spokane & Inland Empire Railroad 208 miles; and that the Detroit United and Lake Shore Electric lines have just inaugurated a through run from Detroit to Cleveland, the 179 miles being covered in six hours twenty-five minutes. From the same source we learn also that groups of interurban lines are forming traffic associations, corresponding to the passenger traffic associations of the steam railroads, for the purpose of promoting the "through" or "interline" business of their members. Thus the Central Electric Railway Association extends over Ohio, Indiana, Michigan, Illinois, and parts of Kentucky, having about forty member companies, representing a total of 3,672 miles of interurban railways. The report of the association (Electric Railway Journal, Jan. 6, 1912, p. 13) says:

> To-day it is no unusual circumstance for a passenger to travel from Kentucky to the eastern and northern parts of Ohio or to

> Michigan over traction lines, many of the runs covering a distance of from 150 to 200 miles of through limited cars. * * * and in many instances the limited cars attain a speed of from 60 miles per hour to 65 miles per hour over portions of their run. One of the member companies is to-day operating specially constructed modern sleeping cars with every convenience equal to the latest Pullman.

Such new developments in railroad methods automatically fall within general terms of remedial statutes, such as the Interstate Commerce Act, when they fall within the *policy* of the enactment, and the mischiefs aimed at. Our legislation is not construed to be so rigid that it can not be applied to changing conditions. (*Weems* v. *United States,* 217 U. S., 349, p. 373; *De Lima* v. *Bidwell,* 182 U. S., 1, p. 197; cf. *Bishop* v. *North,* 11 Mees. & W., 418.)

SECOND POINT.

Neither the language nor the context indicates any intention to exclude from the operation of the act interurban electric railways engaged in interstate commerce.

The language is:

> Any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water * * *).

The words "any common carrier engaged in transportation by railroad" are broad enough. They seem to reach every carrier which transports on rails, irrespective of any peculiarity in the identity of the company which operates. They are more general even than would have been the words "any railroad," which is the language assumed as the basis of the appellants' argument.

Nowhere in the act is there any express exclusion of the interurban electric railroads from the scope of this inclusive language. The appellants have argued that the use of the word "railroad" is itself sufficient to accomplish this result; that "railroad" can mean only a commercial steam railroad. This would be an extremely narrow interpretation, and one which, as we have seen, would seriously injure the effectiveness of the statute within its normal field.

These interurban railroads have been a great many times classified within statutes dealing with "railroads," as distinguished from "street railways."

Both Iowa and Nebraska recognize the fact that the interurban railroads are to be classified with the ordinary railroads rather than with the local street-car lines.

In Iowa the discrimination is made by the code, section 2033, a and b, as follows:

> *Any railway* operated upon the streets of a city or town by electric or other power

than steam which *extends beyond the corporated limits* of such city or town to another city, town, or village, or any railway operated by electric or other power than steam, extending from one city, town, or village to another city, town, or village shall be known as *interurban* railway.

The words *railway,* * * * *railroad,* * * * etc., as used in the code and acts of the general assembly, now in force or hereafter enacted, are hereby declared to apply to and *include all interurban railways.* * * *

In *Cedar Rapids, etc., M. C. Ry. Co.* v. *Cummins* (101 N. W., 176), (Iowa) the Supreme Court of the State of Iowa held, under these sections, that the electric interurban railway from Cedar Rapids to Marion in Iowa was subject to the same tax laws as ordinary railroads, though if it had run only within the corporate limits of a city it would be under different regulations.

In Nebraska, likewise, the class of so called " interurban railroads " is recognized by statute and given the powers of eminent domain.

* * * shall have the right to construct and operate *interurban railroads,* using motive power other than steam, and in the construction and operation of said interurban railroads shall have all the powers of eminent domain contained in said chapter. Cobbey's Annotated Statutes of Nebraska, 1909, sec. 10517.)

Indeed, with the growth of this branch of railroad traffic into major dimensions and importance, its distinction from the mere local street railways and its identity with the old school railroads have been generally recognized.

Elliott on Railroads (2nd ed., Ch. XLIV) devotes an entire chapter to the discussion of interurban railroads, as a third class, wholly distinct from either street or commercial railroads. In sec. 1096ba he quotes and substantially adopts the definition from the Iowa Code, supra, and in sec. 1096bb, he further says:

> As already stated, interurban railroads frequently have their own rights of way in the country, often carry freight of some kinds at least, and may, and do sometimes, operate substantially as a through railroad from one city to another, miles away (citing *Mallott* v. *Collinsville, etc., R. Co.* 108 Fed., 313, 318). Indeed, the day seems not far distant when one may go, by such roads, almost across the continent. The better and faster cars are devoted more and more to through travel from one large city to another, rather than to the accommodation of local traffic between or in the smaller places.

City of Philadelphia v. *Philadelphia Traction Co.*, 55 Atl., 762 (Penn):

> Railroad and railway are synonymous. Either includes street railway, unless something in the act, title, purpose, or context prevents it.

Cincinnati, etc., Electric R. R. Co. v. *Lohe,* 68 Ohio, St. 101.

Held that an interurban electric railroad, though not classed with steam railroads ordinarily under Ohio statutes, was nevertheless a "railroad" within the meaning of statutes to prevent the negligent running of cars, though street-car lines would not have been.

Malott v. *C. & E. St. L. Electric R. Co.,* 108 Fed., 313:

Statute giving commission power to prescribe place and manner of crossing tracks of another railroad.

Riggs v. *St. Francois Co. Ry. Co.,* 120 Mo. Supp., 335:

Statutes requiring fencing of right of way.

Montgomery St. Ry. Co. v. *Lewis,* 148 Ala., 134:

Regulations as to care in operating.

Katzenberger v. *Lawo,* 90 Tenn., 238:

Railway in city streets, exclusively engaged in carrying passengers, held "railroad" within statute requiring lookout on locomotive and whistle to be sounded.

Hestonville, etc., R. R. v. *Phila.,* 89 Pa. St., 210.

Statutes authorizing consolidation of railroads, includes street railroads.

In re Washington Street Ry. Co., 115 N. Y., 442.

Statutes authorizing consolidation.

Central National Bank v. *Worcester H. R. Co.*, 13 Allen, 105.

Statute that any corporation "except railroad and banking corporations" could institute insolvency proceedings.

Egan v. *Cheshire St. Ry. Co.*, 78 Conn., 291.

Statutory lien in favor of anyone rendering services in construction of a railroad.

Savannah, etc., R. Co. v. *Williams*, 117 Ga., 414.

Statute abolishing fellow-servant rule.

Rafferty v. *Central Traction Co.*, 147 Pa. St., 579.

Statute giving right to lease lines.

Bloxham v. *Consumer's, etc., Co.*, 36 Fla., 519.

Purposes of taxation.

City of Chicago v. *Evans*, 24 Ill., 52, 55.

Horse railroads included in statute permitting lease of lines.

Citizens R. Co. v. *Pittsburg*, 104 Pa. St., 522.

Act taxing railroads held to include street railroads.

Bloxham v. *Consumer's E. Co. and St. Ry.*, 36 Fla., 519.

Tax statute.

Clinton v. *Iowa*, 37 Iowa, 61.

Right of way statute (horse railroad).

Lieberman v. *R. R.*, 141 Ill., 140.

Eminent domain statute (elevated road).

Baldwin, Am. Railroad Law, 9.

Birmingham R. Co. v. *Jacobs*, 92 Ala., 187:

> A railroad * * * running beyond the corporate limits of any city or town and through counties, is not and necessarily cannot be a street railway * * *.

Diebold v. *Kentucky Traction Co.*, 24 Ky. L. R., 1275:

> The term "street railway" as used in sec. 163 of the State constitution, means, and can only mean, applying to it a common sense interpretation, those street railroads which, before the introduction of electricity, used mules and horses as motor power for drawing the street cars over its street car tracks, for the use and convenience of the local public *in a municipality*. Those street cars that run along the streets of a city, picking up passengers here and there, and putting them off at street crossings and at the termini of the street car companies' tracks within the municipality. They were created and organized and operated, and such was their character as defined in their charter, strictly and exclusively for the local convenience of those persons or passengers whose pleasure or business prompted them to go from point to point within the city. They were never intended for commercial purposes between different cities within a State, or between different cities in different States.

The significance attached to particular terms by special local statutes, or by local usage, can not con-

trol the construction of an act of Congress. If it did so Federal statutes would mean one thing in one State and one thing in another.

A similar situation arose in *Liverpool Insurance Co.* v. *Mass.* (10 Wall., 566), in which an association was held to be "a corporation" within the meaning of the Massachusetts corporation-tax law, although the law of England, under which it was organized, expressly provided that it should *not* be "a corporation."

Nor is there any merit in the argument that these appellants should not be classified with railroads, because they were incorporated, not under the railroad incorporation law, but under the street railway incorporation law of Nebraska. The point to be considered is not what they are legally empowered to do, but what they are in fact doing.

Whether the Nebraska corporation is acting ultra vires in operating an interurban railroad is immaterial. This point was unanswerably covered by the opinion of the Commerce Court. Judge Mack says:

> Whether or not the street railway company is empowered as a Nebraska corporation to operate the bridge and the Iowa lines is immaterial in this case. It is, rightly or wrongly, engaged in their operation, and it is, therefore, a common carrier engaged in the interstate transportation of passengers by electric railway.

> It is likewise immaterial to this inquiry that the street railway company is created under the street railway and not under the commercial railroad act of Nebraska. If, soundly interpreted, the Federal act gives the commission jurisdiction over such electric railways, State legislation is powerless to limit or to prevent such grant. (Tr., p. 42.)

Of course, the mere use of electric power, rather than steam, does not by itself determine the question whether a carrier is a "railroad."

Malott v. *C. & E. St. & Electric Ry. Co.*, 108 Fed., 313.

Diebold v. *Ky. Traction Co.*, 25 Ky. L. Rep., 1275 (77 S. W., 674).

Riggs v. *St. Francois County Ry.*, 120 Mo. App., 335.

Stillwater v. *St. R. Co.* v. *Boston, etc., R. Co.*, 171 N. Y., 589.

> An electric railroad carrying both passengers and freight was allowed to compel a steam railroad to give it track connections under a statute giving that right to "every railroad corporation."

McDonald v. *Union Freight R. Co.*, 190 Mass., 123.

> Tax on earnings of street railways. Statutes defined street railways as those using some motive power other than steam. But a steam railroad whose charter gave it all the

privileges of street railroads had to pay the tax.

Nor is the purpose of the act limited to the protection of freight alone. The carrying of passengers is equally within its scope. This is explicit enough from the following points appearing on the face of the act:

> The constant use in the disjunctive of the words "transportation of passengers *or* property"; as in "this act shall apply * * * to any common carrier or carriers engaged in the transportation of passengers *or* property."
>
> The prohibition of free passes. (Sec. 1.)
>
> The requirement of posting of "rates and fares" (sec. 6) as a prerequisite to engaging in the transportation of "passengers *or* property."
>
> The power given the commission to prescribe charges for the transportation of "persons *or* property" (sec. 15) and to suspend new schedules of "*fares.*"
>
> Reports to contain information concerning "fares *or* freights." (Sec. 20.)
>
> Allowance of mileage, excursion, and commutation tickets, together with reduced rates to certain classes of persons. (Sec. 22.)

Finally, it is to be observed that nothing in the context indicates any intention to exclude this

species of railroads. It is urged that many of the requirements of the act could not possibly apply to this sort of railroad but the same thing is true as to the old-style railroads themselves, and the sleeping-car companies, and the pipe lines, and the telegraph and telephone companies. Of course, not every provision of a statute is applicable to every portion of its field.

Without insisting, therefore, upon the all-inclusive definition, it is sufficient for present purposes to recognize the fact that these interurban lines constitute a species of rail traffic wholly distinct from the ordinary street railway. It is submitted that for the purposes of this act the interurban lines should be classified not with the street railways, but with the steam lines which they approximate in function.

THIRD POINT.

The administrative construction by the commission has been long acquiesced in and finally ratified by Congress.

The Interstate Commerce Commission has consistently assumed jurisdiction over this class of railroads. They file their schedules of rates just as the steam roads do. At the present moment the commission has in its public records between 3,000 and 4,000 electric-railway tariffs.

The commission has made repeated formal decisions upon the subject, as in *Willson* v. *Rock Creek Ry.*, 7 I. C. C., 83 (decided in 1897); *C. & M. Electric R. R. Co.* v. *I. C. R. R. Co.*, 13 I. C. C., 20; *Beall* v. *W., A. & Mt. V. Ry.*, 20 I. C. C., 406; *C. & C. Traction Co.* v. *B. & O. S. W. R. R. Co.*, 20 I. C. C., 486. Since the decision by the commission of the Rock Creek case (involving a line entering the District of Columbia) Congress has repeatedly amended the act, but it has never disturbed that decision.

Furthermore, by the last amendment, made in 1910, it assumed that the general jurisdiction existed, and put a limitation upon it, as follows:

> The commission shall not, however, establish any through route, classification, or rate between *street electric passenger railways* not engaged in transporting freight in addition to their passenger and express business *and railroads of a different character.*

This limitation of the power was inserted without any coincident insertion of a grant of the general power, and that general power was left to rest solely on the generic meaning of the word "railroad" where, as we contend, it always had been.

If Congress had supposed that the words "carrier by railroad" did not include this sort of carrier, this amendment would have been mere silliness, being a limitation of a power which would have had no existence at all; and if Congress had not concurred in the commission's entire assump-

tion of jurisdiction it certainly would not have eliminated a mere small part of it.

FOURTH POINT.

Even if the commission's order was without lawful authority at the time it was made, the amendment of 1910 either ratified it altogether or at least validated it for the future.

Assuming, for the purpose of argument, that the amendment of section 15 by the act of June 18, 1910, was not declaratory of the jurisdiction of the commission over the electric railroads, it must, at least, have created such a jurisdiction by implication from the limitation it expressly made upon it.

At the time of the amendment the commission's order had been some four months in operation. For even that passed time it was ratified by the amendment, within the decisions of the court.

In *Hamilton* v. *Dillon* (21 Wallace, 73, 88, 95) it appeared that during the Civil War the Secretary of the Treasury had exacted four cents a pound for permission to trade in cotton over the Confederate line. On a suit to recover back the money as unlawfully exacted, it was held that even if the act had been beyond the authority of the executive, it had been ratified by a later act of Congress and this even though the statute did not in terms specify ratification.

The same principle was held in *Mattingly* v. *Dist. of Col.* (97 U. S., 687, 690):

> The board of public works had made *ultra vires* improvements, and to pay for

> them had levied a special assessment upon the plaintiff. Later an act by Congress gave the board power to carry on works of the sort in question. The court held that the plaintiff could not recover back the assessment. It had been ratified by the grant of the power. Here again the statute did not expressly state the ratification.

See also *Nat. Bank* v. *Shoemaker* (97 U. S., 692); *U. S.* v. *Heinszen* (206 U. S., 370).

At best, however, from the time the power was given (which on this theory would have been June 10, 1910) the order was valid, and therefore it should not be set aside.

B. & O. R. R. Co. v. *I. C. C.* (221 U. S., 612) is directly in point. That is the case in which the court considered an order of the commission made in 1908 requiring monthly reports concerning hours of service.

The B. & O. R. R. sought to have the order annulled as beyond the authority of the commission. It had been agreed that pending suit reports should not be required, so that only the future operation of the order was involved.

The court held that—

> * * * although there might have been doubt as to the adequacy of the authority of the commission, under the law as it formerly stood, to require the reports, there can be none now in view of the amendment of sec-

tion 20 of the act to regulate commerce by the act of June 18, 1910.

* * * This clearly embraces the power which the commission here asserts, and it is certainly now entitled to promulgate an order requiring reports to be made. It follows that, as under the stipulation of record here the requirement is to operate wholly in the future, and it has been suspended awaiting the final determination of this cause, the question of the authority of the commission at the time the order was made has become a moot one.

The court therefore affirmed the judgment sustaining the demurrer to the petition which attacked the order as invalid.

FIFTH POINT.

The judgment should be affirmed, or if not affirmed as rendered, should be modified to set aside the order only in its operation prior to June 18, 1910.

February, 1912.

WINFRED T. DENISON,
Assistant Attorney General.

THURLOW M. GORDON,
Special Assistant to the Attorney General.

○

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY *v.* INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

No. 458. Argued February 19, 20, 1912.—Decided June 9, 1913.

The meaning of the Act to Regulate Commerce and whether it applies to street railways carrying passengers over a state line cannot be determined from statements made in Congress during the debates on the bill; the act must be interpreted by its own terms as looked at in the whole.

In terms the Act applies to all carriers engaged in the transportation of passengers or property by railroad, and the scope of the act depends on the definition of the word "railroad" as used in 1887 when the act was originally passed.

Street railways for passengers only, as they existed in 1887, were not within the contemplation of Congress in passing the Act to Regulate Commerce, such railroads are not subject to its provisions or under the jurisdiction of the Interstate Commerce Commission even though they carry passengers across the state line.

Quære to what extent since the passage of the act of June 18, 1910, interstate railways doing passenger, freight and express business are now under the jurisdiction of the Interstate Commerce Commission, and if so, to what extent.

191 Fed. Rep. 40, reversed, and 179 Fed. Rep. 243, affirmed.

THE facts, which involve the jurisdiction of the Interstate Commerce Commission over certain classes of street railway systems, are stated in the opinion.

Mr. John Lee Webster, with whom *Mr. Frederic D. McKenney* was on the brief, for appellants:

The original and amendatory statute regulating commerce at the time said order was made, did not include street railway companies. The term "railroad" in said act applies only to commercial railroads as distinct from street railway companies.

See express statement to that effect by Senator Cullom, chairman of the committee having the bill in hand. Cong. Rec., Vol. 17, Pt. IV, p. 3472; *Wilson* v. *Rock Creek Railway Co.*, 7 I. C. C. Rep. 83.

The word "railroad" as used in the constitutions and statutes of the various States does not include street railway companies, and street railway corporations are not governed by laws relating to railroads. This distinction between the two kinds of railroads was well known at the time of the passage of the act to regulate commerce.

In the following cases the word "railroad" as used in the constitutions and statutes of the several States does not include a street railway. Street railways are not included in fellow servant acts, in railway commission acts, in judgment lien acts, and other laws enacted to govern and control railroads, unless specifically mentioned therein. *Street Ry. Co.* v. *Cedar Rapids*, 106 Iowa, 467; *Funk* v. *St. Paul Ry. Co.*, 61 Minnesota, 435; *Lincoln Traction Co.* v. *Webb*, 73 Nebraska, 136; *Daily* v. *Milwaukee & E. R. L. Co.*, 119 Wisconsin, 398; *Lincoln Street R. R. Co.* v. *McClellan*, 54 Nebraska, 672; *Omaha Street R. Co.* v. *Boesen*, 74 Nebraska, 765; *Railroad Co.* v. *Railroad Commissioner*, 73 Kansas, 168; *State* v. *Cain*, 69 Kansas, 186; *Manhattan Trust Co.* v. *Sioux City Cable Ry. Co.*, 68 Fed. Rep. 82; *Bridge Co.* v. *Iron Co.*, 59 Ohio St. 179; *Front Street Cable Ry. Co.* v. *Johnson*, 2 Washington, 112; *Louisville &c. Ry. Co.* v. *Louisville City Ry. Co.*, 2 Duvall (Kentucky), 175; *In re New York District Ry. Co.*, 107 N. Y. 42; *Railroad Commissioners* v. *Market Street R. R. Co.*, 132 California, 677; *Thompson-Houston Co.* v. *Simon*, 20 Oregon, 60; *Sams* v. *St. Louis Ry. Co.*, 174 Missouri, 53; *State* v. *Duluth Gas Co.*, 76 Minnesota, 96; *Gyger* v. *West Phila. Ry. Co.*, 136 Pa. St. 16; *Riley* v. *Galveston City R. R. Co.*, 35 S. W. Rep. 826; *State* v. *Lincoln Traction Co.*, Nebraska, Jan. 3, 1912; *Sears* v. *Railway Co.*, 65 Iowa, 742; *Freiday* v. *Sioux*

City Transit Co., 92 Iowa, 191; *Massachusetts Trust Co.* v. *Hamilton*, Rep. 588.

Under the constitution and laws of Nebraska, appellant is a street railway and is not a street railroad.

There is a well defined and marked distinction between railroad corporations and street railway corporations under the constitution and laws of the State of Nebraska. *Lincoln Street Railway* v. *McClellan*, 54 Nebraska, 672; *Omaha Street Ry. Co.* v. *Boesen*, 74 Nebraska, 764; *Lincoln Traction Co.* v. *Webb*, 73 Nebraska, 136; *Tyrrell* v. *Lincoln Traction Co.*, January 3, 1912.

Appellant is incorporated as a street railway company under the laws of the State of Iowa which also recognize the well defined distinction between street railways and railroads. *Sears* v. *Railway Co.*, 65 Iowa, 742; *Freiday* v. *The Sioux City Transit Co.*, 92 Iowa, 191; *City R. R. Co.* v. *Cedar Rapids*, 106 Iowa, 476.

The dual functions of a commercial railroad and a street railway cannot be combined in the same corporation. *Gillette* v. *Aurora Ry. Co.*, 228 Illinois, 261; *Chicago & Southern Traction Co.* v. *Flaherty*, 222 Illinois, 67; *Bradley Mfg. Co.* v. *Traction Co.*, 229 Illinois, 170, 176.

The Act to Regulate Commerce has been under discussion, and various amendments have been made thereto since its first enactment in 1887. If Congress intended to extend said act to include street railways why has not such amendment been made when other amendments were being made to the act?

In deciding whether the Act to Regulate Commerce applies to street railways it is proper to consider the inconveniences that would result to the public by compelling interchange of freight and cars and passengers between commercial railroads and street railway companies, as well as the fact stated *supra* that there exists no necessity, nor public demand for the regulation of street railway companies by the Interstate Commerce

Commission. *Michigan Ry. Co.* v. *Hammond Electric Ry. Co.*, 83 N. E. Rep. 650; *Massillon Bridge Co.* v. *Cambria Iron Co.*, 59 Ohio St. 179.

The order of the Commission is void because it was beyond the scope of the complaint, and for the further reason that the effect of the order is to require appellant to receive and carry in its cars to all points within the city of Omaha, and without compensation, persons who have paid a fare of ten cents to ride on the bridge line from Council Bluffs, Iowa, to the eastern boundary of the city of Omaha, and is therefore a direct interference with what is intrastate business.

Mr. Charles W. Needham for the Interstate Commerce Commission:

The power of Congress to regulate commerce is not confined to any particular agency or instrumentality. *Gibbon* v. *Ogden*, 9 Wheat. 1, 196; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Employers' Liability Case*, 207 U. S. 493; *Hopkins* v. *United States*, 171 U. S. 597.

It embraces all the instruments by which such commerce may be conducted. *Welton* v. *Missouri*, 91 U. S. 275; citing *Mobile County* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Hooper* v. *California*, 155 U. S. 648, 653; *United States* v. *E. C. Knight Co.*, 156 U. S. 1.

Commerce as used in the commerce clause of Constitution has reference to transportation, that is, the movement of either property or persons. *Chicago R. R. Co.* v. *Fuller*, 17 Wall. 560.

Congress exercises its regulating power by direct and appropriate legislation and in this case through the Interstate Commerce Commission acting under the powers granted by the Act to Regulate Commerce. See the Act to Regulate Commerce, as amended, and the acts supplementary thereto, see also *Texas R. Co.* v.

Int. Comm. Comm., 162 U. S. 197; *Cincinnati R. Co.* v. *Int. Comm. Comm.*, 162 U. S. 184; *Balt. & Ohio R. R. Co.* v. *United States*, 215 U. S. 481; *Int. Comm. Comm.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S. 88; *Southern Pacific Co.* v. *Int. Comm. Comm.*, 219 U. S. 433; *Southern Pacific Terminal Co.* v. *Int. Comm. Comm.*, 219 U. S. 498; *Int. Comm. Comm.* v. *Del., Lack. & West. R. R.*, 220 U. S. 235.

The Act to Regulate Commerce as amended defines the carriers subject to the act.

Congress and the Interstate Commerce Commission have jurisdiction over a common carrier operating cars by electricity, and the fact that it is an electric street railway does not exempt it from such regulating power. As to legislative construction see *Willson* v. *Rock Creek R. Co.*, 7 I. C. C. 83, 88.

See also *Chi. & Mil. Electric R. R.* v. *Ill. Cent. R. R. Co.*, 13 I. C. C. 20; *Beall* v. *Washington & Mt. Vernon Ry.*, 20 I. C. C. 406; *Cincinnati Traction Co.* v. *B. & O. S. W. R. R. Co.*, 20 I. C. C. 486.

If the Act to Regulate Commerce did not include "street electric passenger railways" there was no reason for excepting this class of railways from the additional power conferred upon the Commission to establish through routes and joint rates. As to judicial construction, see *Grinsfelder* v. *Spokane Street R. Co.*, 53 Pac. Rep. 719; *Densmore* v. *Racine M. R. Co.*, 12 Wisconsin, 649; *McCleary* v. *Babcock*, 82 N. E. Rep. 453, 456; *Riggs* v. *San Francois County Ry. Co.*, 96 S. W. Rep. 707, 708; *Heastonville R. R. Co.* v. *Philadelphia*, 89 Pa. St. 210; *Gyger* v. *Philadelphia City Passenger R. Co.*, 136 Pa. St. 96; *Cheaton* v. *McCormick*, 178 Pa. St. 186; *Old Colony Trust Co.* v. *Rapid Transit Co.*, 192 Pa. St. 596; *Penna. R. R. Co.* v. *Pittsburg*, 104 Pa. St. 552; *Rafferty* v. *Central Traction*, 147 Pa. St. 579; *Reeves* v. *Philadelphia Tr. Co.*, 152 Pa. St. 153; *Old Colony Trust Co.* v. *Allentown*, 192 Pa. St. 596; *Employers' Liability Cases*, 207 U. S. 463, 497.

The comprehensive language of the statute includes trolley lines and every common carrier engaged in interstate traffic by railroad.

Appellants are not ordinary street car companies; they are bridge and railway companies. The bridge company was not organized as a "street" railway company, but as a "railway and bridge company," and its lessee, as operating company, is exercising these functions.

Traffic over a bridge spanning navigable waters separating two States is interstate commerce. *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204.

The railroad is an interurban road connecting two cities located respectively in two States, and such transportation and facilities constitute interstate commerce. *Gibbon* v. *Ogden, supra; Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Munn* v. *Illinois*, 94 U. S. 113; *C., B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557.

Where several instrumentalities of commerce have been merged in one ownership by purchase or lease and are operated by one company, such instrumentalities, in so far as they are used for interstate commerce, are voluntarily brought under the jurisdiction of Congress and the Interstate Commerce Commission. The fact that one or more of such instrumentalities are used in a greater degree for intrastate business than for interstate business does not lessen the regulating power of the Interstate Commerce Commission over the interstate traffic, and the Commission may establish a through route and a joint through rate for interstate traffic over all of said instrumentalities. *C., N. O. & T. P. Ry. Co.* v. *Int. Comm. Comm., supra.*

The fact that these corporations are organized under state laws, general or special, as commercial or as street railways does not change the character of the commerce nor exempt the companies actually doing the interstate

business from Federal regulation as to the interstate traffic.

The fact that this company does not carry freight, but confines its business to the carrying of passengers, does not exempt it from Federal control.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States:

The Act to Regulate Commerce covers, among other things, "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad." Even assuming for the purpose of argument that this generic language does not include merely municipal trolley railroads, it still includes the species of railroad known as "interurban" railroads.

The Interstate Commerce Commission reported as a fact, and upon facts sufficient to justify their conclusion, that the appellants were an "interurban" railroad, as distinguished from a local street railroad.

It is of no importance that this species of railroad did not exist at the time the act was originally passed, because it falls within the generic term, and also within the policy. *Weems* v. *United States*, 217 U. S. 349, p. 373; *De Lima* v. *Bidwell*, 182 U. S. 1, p. 197; *Bishop* v. *North*, 11 Mees. & W. 418.

Nothing in the language or context excludes this species of railroad from the general language. The word "railroad" does not exclude it, and indeed "interurban railroads" are considered to be "railroads" as distinguished from "street railways" by the laws not only of Iowa, Code, § 2033 a and b; *Cedar Rapids &c. M. C. Ry. Co.* v. *Cummins*, 125 Iowa, 430, and of Nebraska (Cobbey's Ann. Stat. of Nebraska, 1909, § 10517); but by numerous other authorities. *City of Philadelphia* v. *Philadelphia Traction Co.*, 55 Atl. Rep. 762 (Penn.); *Cincinnati &c. Electric R. R.*

Co. v. *Lohe*, 68 Oh. St. 101; *Malott* v. *C. & E. St. L. Electric R. Co.*, 108 Fed. Rep. 313; *Riggs* v. *St. Francois Co. Ry. Co.*, 120 Mo. Supp. 335; *Montgomery St. Ry. Co.* v. *Lewis*, 148 Alabama, 134; *Katzenberger* v. *Lawo*, 90 Tennessee, 238; *Hestonville &c. R. R.* v. *Philadelphia*, 89 Pa. St. 210; *In re Washington Street Ry. Co.*, 115 N. Y. 442; *Central National Bank* v. *Worcester H. R. Co.*, 13 Allen, 105; *Egan* v. *Cheshire St. Ry. Co.*, 78 Connecticut, 291; *Savannah &c. R. Co.* v. *Williams*, 117 Georgia, 414; *Rafferty* v. *Central Traction Co.*, 147 Pa. St. 579; *Bizzham* v. *Consumers' &c. Co.*, 36 Florida, 519; *City of Chicago* v. *Evans*, 24 Illinois, 52, 55; *Citizens' R. Co.* v. *Pittsburg*, 104 Pa. St. 522; *Clinton* v. *Iowa*, 37 Iowa, 61; *Lieberman* v. *R. R.*, 141 Illinois, 140; Baldwin, Am. Railroad Law, 9; *Birmingham R. Co.* v. *Jacobs*, 92 Alabama, 187; *Diebold* v. *Ky. Traction Co.*, 24 Ky. L. R. 1275; Elliott on Railroads (2d ed., Ch. XLIV).

The essential thing, however, is not the classification of the operating company under the corporation laws of the State, but the nature of the operation within the intent of the Interstate Commerce Act. *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566.

The mere use of electric power rather than steam does not take a railroad out of the sphere of the Interstate Commerce Law. *Malott* v. *C. & E. St. & Electric Ry. Co.*, 108 Fed. Rep. 313; *Diebold* v. *Ky. Traction Co.*, 25 Ky. L. Rep. 1275 (77 S. W. Rep. 674); *Riggs* v. *St. Francois Co. Ry.*, 120 Mo. App. 335; *Stillwater & St. R. Co.* v. *Boston &c. R. Co.*, 171 N. Y. 589.

Nor does the fact that it carries no freight. Sections 1, 6, 15, 20 and 22 of the Statute.

The Interstate Commerce Commission has constantly assumed jurisdiction over this class of railroads. *Willson* v. *Rock Creek Ry.*, 7 I. C. C. 83 (decided in 1897); *C. & M. Electric R. R. Co.* v. *I. C. R. R. Co.*, 13 I. C. C. 20; *Beall* v. *W. A. & Mt. V. Ry.*, 20 I. C. C. 406; *C. & C. Traction Co.* v. *B. & O. S. W. R. R. Co.*, 20 I. C. C. 486.

This assumption of jurisdiction has generally been acquiesced in, there being now in the public records of the Commission between 3,000 and 4,000 electric-railway tariffs.

This assumption of jurisdiction was confirmed by Congress by the amendment in 1910 of § 15, withdrawing from the Commission the power to establish a through route between "street electric passenger railways not engaged in transporting freight in addition to their passenger and express business and railroads of a different character."

Even if prior to this amendment the Commission did not have the power, it was granted by the amendment and thereby the order was ratified. *Hamilton* v. *Dillon*, 21 Wall. 73, 88, 95; *Mattingly* v. *Dist. of Col.*, 97 U. S. 687, 690; *Nat. Bank* v. *Shoemaker*, 97 U. S. 692; *United States* v. *Heinszen*, 206 U. S. 370.

At least the amendment validated the order from the time it went into effect, which was June 10, 1910. *B. & O. R. R. Co.* v. *I. C. C.*, 221 U. S. 612.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Omaha & Council Bluffs Railway & Bridge Company was chartered as a Street Railroad Company under the laws of Iowa. It owned street car lines in Council Bluffs and, in 1887, was authorized by Congress to construct a bridge across the Missouri River and to operate thereon "steam, cable and street cars." (March 3, 1887, 24 Stat. 501, c. 356.) The Omaha & Council Bluffs Railway, chartered as a Street Railroad under the laws of Nebraska, owned the street car lines in Omaha and its suburbs, South Omaha, Benson, Dundee and Florence. This street railroad had no right of eminent domain and was not authorized to haul freight, being limited by its charter to carrying passengers only. By lease it acquired

the bridge and car lines in Council Bluffs which thereafter it operated as part of its system. Complaint having been made that certain interstate fares were unreasonable, a hearing was had before the Commerce Commission, which, on November 27, 1909 (17 I. C. C. 239), ordered a reduction in the rate between Council Bluffs, Iowa, and points beyond the Loop, in Omaha, Nebraska. The two companies, lessor and lessee, thereupon filed a bill in the United States Circuit Court for the District of Nebraska to enjoin the order. The case was heard before three Circuit Judges, who (179 Fed. Rep. 243) granted a temporary injunction.

The case was transferred to the Commerce Court, which, on October 5, 1911, dismissed the bill, 191 Fed. Rep. 40.

On the argument of the appeal in this court, the sole question discussed was whether the provisions of the Commerce Act as to railroads applied to street railroads, the appellant relying, among other things, on the fact that during the discussion in the Senate the author of the bill and Chairman of the Senate Committee to which it had been referred, said (17 Cong. Rec. Pt. IV, p. 3472) "that the Bill is not intended to affect the stage coach, the *street railway*, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects." After quoting § 1 [1] and this statement and construing it in the light of the broad scope of the act, the Commerce Court held that the meaning of the statute could not be determined from statements used in debate. We concur in that view. The act must

[1] SEC. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by

be interpreted by its own terms, and we must look to it as a whole, in order to determine whether it applies to Street Railroads, carrying passengers between cities divided by a state line.

The statute in terms applies to carriers engaged in the transportation of passengers or property by railroad.

But, in 1887, that word had no fixed and accurate meaning, for there was then, as now, a conflict in the

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means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia to any other State or Territory or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier," as used in this act, shall include express companies and sleeping car companies. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property. (24 Stat. 379.)

decisions of the state courts as to whether street railroads were embraced within the provisions of a statute giving rights or imposing burdens on railroads. The appellants cite decisions from twelve States holding that in a statute the word "railroad" does not mean "street railroad." The defense cite decisions to the contrary from an equal number of States. The present record discloses a similar disagreement in Federal tribunals. For not only did the Commerce Court and the Circuit Court differ, but it appears that the members of the Commission were divided on the subject when this case was decided and also when the question was first raised in *Willson* v. *Rock Creek Ry. Co.*, 7 I. C. C. 83.

This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads and street railroads, there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word "Railroad" includes Street Railroad, unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that "Railroad" does not include Street Railroad unless required by the context, since, as tersely put by the Court of Appeals of Kentucky, "a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is from a road." *Louisville & Portland R. R. Co.* v. *Louisville City Ry. Co.*, 2 Duvall, 175.

But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word "Railroad" will include Street Railroad. On the other hand, if the act was aimed at Railroads proper, then Street Railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary

railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street Railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight "between States," "between States and Territories," "between the United States and foreign countries." The act referred to Railroads which were required to post their schedules—not at street corners where passengers board street cars, but in "*every depot, station or office where passengers or freight are received for transportation.*" The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce.

Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads which did not do the business Congress had in contemplation and had not engaged in the pooling, rebating and discrimination which the statute was intended to prohibit. This was recognized in *Willson* v. *Rock*

Creek Ry. Co., 7 I. C. C. 83, where, although it was held that the statute applied to a street railroad between Washington, D. C., and a point in Maryland, the Commission nevertheless said (7 I. C. C. 88): "It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads in their dealing with the public."

Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad "subject to the act" being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word "railroad" cannot be construed to include street railroad.

But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight. The case was heard on demurrer, with the opinion of the Commission treated as a part of the record. It indicates that at some points the line is on private property, but where this is and to how great an extent does not appear. Indeed, the record does not show that electricity was used as a motive power, though, in the light of modern methods, that may possibly be assumed. But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight and is doing only a business appropriate to a street railroad.

So that whatever the motive power or the size or speed of the cars is immaterial. In any event, there were "street cars" referred to in the act of Congress authorizing the construction of the Bridge from Council Bluffs to Omaha (24 Stat. 501). The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with Railroads for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs.

It is contended, however, that the amendment of June 18, 1910, 36 Stat. 539, 553, c. 309, shows that Congress considered that street railroads were under the jurisdiction of the Commission inasmuch as it then provided that "the Commission shall not establish any through route, classification or rate between street electric passenger railways not engaged in . . . transporting freight . . . and railroads of a different character." It is contended on the other hand that in that statute Congress distinctly recognized that a street electric road was "a different character of railroad," and apprehending that the broad language of the amendment of 1910 might be construed to take in street railroads, this provision was inserted out of abundant caution to prevent that result, as in the case of establishing routes wholly by water, which certainly were not within the terms of the original Act.

This section of the act of 1910, however, having been passed after the order was made by the Commission, Nov. 27, 1909, is not before us for construction and, manifestly, cannot be given a retrospective operation, though the Government insists that it should be given a prospective operation and in its brief contends that "even if the Commission's order was without lawful authority at the time it was made (Nov. 27, 1909) the amendment of 1910 either ratified it altogether, or, at least, validated

it for the future," and, therefore, it was contended "that the judgment should be affirmed, or if not affirmed as rendered, should be modified to set aside the order only in its operation prior to June 18, 1910," on which day the amendment as to electric street passenger cars became effective. *Mattingly* v. *District of Columbia*, 97 U. S. 687; *Lowrey* v. *Hawaii*, 206 U. S. 206; *B. & O. R. R.* v. *I. C. C.*, 221 U. S. 612, are cited to show that Congress might ratify what had not been originally commanded. The first two decisions relate to transactions of a nature entirely different from that here involved; and, in the *Baltimore & Ohio Case*, which was more like this on its facts, the parties pending the suit stipulated that the order should apply only to the future, and it was said that the "question of the authority of the Commission at the time the order was made has become a moot one" (621). There was no such stipulation here, and there being nothing to show that Congress attempted an express ratification, and it being open whether the amendment was intended to confer a jurisdiction not previously given, the motion of the Government to make the order of November 27, 1909, effective from June 18, 1910, cannot prevail.

The decree of the Commerce Court is reversed and that of the three Circuit Judges made permanent.

Reversed.

MR. JUSTICE PITNEY did not hear the argument and took no part in the decision of this case.